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INDEX.

Where a reference is made under any head, the figures refer to the corresponding figures in the Index, and also to the paging of the volume. This plan has been adopted in order to enable the reader to turn at once to the case, should he so prefer, without previously consulting the Index.

ACTION.

1. The defendant has no right to complain of the mode in which this suit is brought, [by plaintiff for the use of W. & H.,] for it gives him the opportunity of pleading any defences he may have against either the nominal or the real plaintiff. *Williams* v. *Hood*, 113.

2. Action to recover back money paid on an altered bill of exchange. *Bullitt* v. *Hewitt*, 327.

3. The object of the possessory action is to enable the person clothed with possession to maintain that possession, and compel his adversary to exhibit and recover on his title. *Brack* v. *Wood*, 512.

4. The rule in Article 44 C. P., that plaintiff must recover on strength of his own and not the weakness of his adversary's title, applied. *Ibid.*

5. The plaintiff to a petitory action must not only make his case probable but legally certain. *In pari casu potior est conditio possidentis.* *Ibid.*

6. An action will not lie against third parties in possession of lands derived by regular conveyance from plaintiff's ancestor, without first impeaching, by direct action, the conveyance made by such ancestor. *Calvit* v. *Mulhollan*, 681.

7. The whole of the property surrendered by the plaintiff having been sold and distributed among the creditors, he, *as syndic*, took a rule on the creditors to show cause why certain judicial mortgages should not be erased, on the ground that they fell by the surrender and final settlement of the insolvent's estate: *Held:* that the rule was properly discharged, the syndic being *functus officio*, and therefore incapable of standing in judgment. *Laforest* v. *His Creditors*, 714.

AFFIDAVIT.

See PRINCIPAL AND AGENT—*Schneider* v. *Vercker*, 274.

AGENT AND AGENCY.

See PRINCIPAL AND AGENT.

ADMINISTRATOR.

See EXECUTOR AND ADMINISTRATOR.

APPEALS.

1. A record was offered in evidence, but not filed, and therefore not copied by the clerk in making up the transcript for the Supreme Court. The transcript was brought up by the appellee, who moved to dismiss the appeal. *By the Court:* It was the duty of the appellant to present her case in such a shape that this court could pass upon the correctness of the judgment appealed from. It is true the appellee has brought up the appeal, on the failure of the appellant to do so. But the deficiency of the record is plainly the fault of the appellant, which should not prejudice appellee. Appeal dismissed. *Murray* v. *Walker*, 72.

2. Motion to dismiss appeal, on the ground that W. & H. had not joined in the appeal bond. *By the Court:* The order of appeal is in favor of the plaintiff generally, and it was not necessary that the appeal bond should be signed by W. & H. The signature of the surety is sufficient. *Williams* v. *Hood*, 113.

3. The fact that the tutrix of P.'s children made herself a party to the suit is no evidence that W. & H. have abandoned the appeal. The tutrix is a proper party, for the legal title to the bill sued on is in the succession of P. *Ibid.*

4. It is not necessary that there should be a technical *contestatio litis*, in order to give the Supreme Court jurisdiction. *Succession of Clarke*, 124.

5. A judgment rendered on the 22d December, and not signed until the 12th of January, may be treated as rendered at the term at which it was perfected by the signature of the Judge, and an appeal, by motion, may be made at that term. *Sacket* v. *Attaway*, 181.

6. Appeal dismissed for want of proper parties. *Robert* v. *Ride*, 409.

7. The practice of the Supreme Court is to notice *ex officio*, and without any motion to dismiss having been made, the want of proper parties for a final decree. *Ibid.*

8. A curator *ad hoc*, whose appointment is superseded before trial, has no capacity to take an appeal, and the subsequent filing of an appeal bond by the proper agents of the party in interest, without a petition and citation, or motion for an appeal, will not constitute a valid appeal. *Spencer* v. *McDonogh*, 420.

9. Articles 880 and 890 C. P. contemplate an amendment of the judgment in favor of the appellee, under an answer, only as against the appellant, and not as between one appellee and his co-appellees. If either of the appellees is dissatisfied with the judgment, he should appeal against his co-appellee. *Fields* v. *His Creditors*, 545.

10. The appellee is entitled to three judicial days in which to move a dismissal of the appeal, unless he waives the right by some action on his part. Filing an answer to the merits, without tendering a motion to dismiss, would import such a waiver, but the act of the court, *ex proprio motu*, setting down the cause for a trial, could not deprive the party of a legal right. *Barham* v. *Livingston*, 604.

APPEALS (*Continued.*)

11. The Clerk's certificate, which states that the record contains a full transcript of all the documents filed, all the proceedings had, and all the evidence adduced on the trial, as on file and of record in his office, is insufficient. *Ibid.*

12. It is imperative on this court to grant to the appellant who claims it, an order to postpone the trial, that the Clerk may have an opportunity to amend his certificate, if he can truthfully do so. *Ibid.*

13. An appeal was filed on the 11th July, 1855, the court being then in session, and the cause was continued on the 20th July, 1855. A motion made by the appellees, on the 16th July, 1856, to dismiss the appeal for irregularities in the transcript, namely, the want of an order of appeal, comes too late. *Temple* v. *Marshall*, 613.

14. Where no term of the court was held at Monroe in October, 1855, though the record of an appeal was returnable at that term, it was held to be a sufficient compliance with the law to file the record at the subsequent term. *State* v. *Evans*, 626.

15. The certificate of the Clerk stated that the "foregoing pages contain a full, true and complete transcript of all the proceedings had and documents filed on the trial in the case of P. v. P., as on file in my office. *Held:* that this does not answer the requirement of Art. 896 C. P. It is not certified that the transcript contains all the evidence adduced on the trial. Appeal dismissed. *Pargoud* v. *Pace*, 644.

16. Where a party whose interest is affected by the judgment is not made one of the obligees in the appeal bond, the appeal will be dismissed on motion. *Hamilton* v. *Phillips*, 675.

17. It is unnecessary for the Judge to fix the amount of a suspensive appeal bond, nor is it necessary for the appellant to execute bond in favor of a party who has no interest in maintaining the judgment so far as appealed from. *Rachel* v. *Rachel*, 687.

See SEIZURE AND SALE—*Mathe* v. *McCrystal*, 4.
See CONSTITUTION—*Kathman* v. *New Orleans*, 145.
See EXECUTOR AND ADMINISTRATOR—*Succession of Pettis*, 177.

ATTACHMENT.

1. The validity of an attachment cannot be drawn in question collaterally, except in cases where there is an entire want of citation. *Goodman* v. *Allen*, 246.

2. An affidavit alleging that the defendant attempted to depart permanently from the State, that he concealed himself to avoid being cited, and that he is about to remove his property out of the State, is insufficient for an attachment. The allegations refer indefinitely to the past, make no allusion to the present or future, and are too vague to form the legal foundation of an attachment. *New Orleans* v. *Garland*, 438.

3. An attachment will issue in favor of a vendee against the property of a non-resident vendor, to secure a claim in warranty. *Bash* v. *Lakin*, 489.

ATTACHMENT (*Continued.*)

4. The Code of Practice, in prescribing the conditions upon which an attachment may issue, requires an oath of the existence of the debt in a form to exclude the exceptions of payment, compensation, &c., and a compliance with its requirements is equivalent to an averment that the debt has not been so extinguished. *Elam* v. *Heirs of Barr*, 622.

5. Writs of attachment are to be satisfied out of the proceeds of the property attached, according to the order of date in which the respective seizures thereof are made. Seizure secures a lien.

Edson v. *Freret*, 710.

See HUSBAND AND WIFE—*Henry* v. *Bryce*, 691.
See PRINCIPAL AND SURETY—*Doane* v. *Telegraph Co.* 504.

ASSESSMENT.

See TAXES.

ATTORNEYS AT LAW.

1. The five per cent. allowed by statute to the Assistant City Attorney on the amount of all fines and penalties collected, in full compensation for his services, has reference to his services anterior to the collection, and to the general understanding of the profession, that an attorney has earned his fee when he has prosecuted or defended a case to judgment; so that the Assistant City Attorney who obtains the judgment, is entitled to the commission, although the actual collection of the debt may be made by his successor. *Hiestand* v. *Labatt*, 30.

2. Where the counsel for plaintiff and defendant have an agreement to take testimony without a commission, and submit the cause—and this with the knowledge of plaintiff, who made no objection—and afterward plaintiff, without discharging his counsel, set his cause for trial, in the absence and without the knowledge of the opposite party or either counsel, it was held that a judgment obtained under such circumstances might be annulled under Article 607 of the Code of Practice.

Lacoste v. *Robert*, 33.

3. Such an agreement is within the discretion of counsel. *Ibid.*

4. The instances of "ill practices," mentioned in Art. 607 of the C. P., are given *exempli gratia*, and are not to be viewed as excluding other cases.

Ibid.

5. Under Article 172 of the Code of Practice, the signature of the advocate or of the party may be affixed to the petition through the agency of another. *Martin* v. *Moore*, 121.

6. Counsel who made a certain admission on the minutes of the court, not permitted to lessen its effect by his own testimony, showing that it was not authorized by his client, and that he made it from the statement of a witness whom he believed, and by whose affidavit, produced, it appeared that the witness did not state quite so much as was covered by the admission. *Perkins* v. *Douglass*, 471.

See USURY—*Race & Foster* v. *Bruen*, 34.
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See JUDGMENT—*Brooks* v. *Cavanaugh*, 183.
See INJUNCTION—*Grey* v. *Lowe*, 391.

ARREST.

1. Article C. P. 223 relates to an arrest for debt simply, where there is an apprehension that the debtor will leave the State or the jurisdiction of the court. The arrest of an applicant for the benefit of the insolvent laws is provided for by the Act "relative to the voluntary surrender of property and mode of proceeding," approved March 15th, 1855.
Figuiere v. *His Creditors*, 557.

2. There is no authority in that Act which authorizes a change in the order of arrest, by requiring a bond to be given with other conditions than those imposed by the District Court. *Ibid.*

AUCTIONEER.

See SALE—*Bodin* v. *McCasky*, 36.

BAILMENT.

1. Gratuitous bailees are not liable except for fraud or gross negligence.
Boyd v. *Estis*, 704.

BANKRUPT ACT.

1. A debtor of the bankrupt, garnisheed by the bankrupt's creditor, cannot, under the Bankrupt Act, plead the bankrupt's discharge—nor assert the rights of the assignee—nor dispute the creditor's right, on the ground that the creditor has proved his claim under the fifth section.
Frasier v. *Banks*, 31.

BANKS AND BANKING.

1. Sale of mortgage stock of the bank, bought by the bank. Sale sought to be set aside on the ground that the stock could not be sold apart from the real estate upon which it was secured. *By the Court:* We can see no good reason why the bank might not seize and sell any property of their debtor for the satisfaction of their debt. Certainly the objection is one which cannot be raised by the debtors, whose acts in the premises gave a sanction to the proceedings, and who are without interest in the enforcement of the supposed prohibition which they invoke. *Bermudez* v. *Union Bank*, 64.

2. The bank had a right to make purchases of this character under the provisions of the Act of 1843. *Ibid.*

3. The general banking law, approved April 30th, 1853, in regard to the privileges and immunities granted under it, is as much a contract with the individual corporations formed under the Act, as would be a special Act of incorporation containing the like provisions.
New Orleans v. *Southern Bank*, 41.

4. The 35th section of the general banking law is a guarantee to the capitalist that, if he invests in the stock of the banks created under this law, his stock shall not be taxed in any other manner than other personal property; and thus far is an obligation binding on the State and all municipal or other corporations deriving their authority from the State. *Ibid.*

5. The provision of the 1st section of the Act of 1842, which authorizes the city of New Orleans to fix the rate of licenses for "*all other callings, professions or business*," not enumerated therein, includes corporations as well as natural persons. VOORHIES, J. (with whom concurred BUCHANAN, J.), dissenting. *Ibid.*

6. The 35th section of the Free Banking Law, which provides, "that bankers and banking companies doing business under this Act, shall be

BANKS AND BANKING (*Continued.*)

taxed upon their capital stock at the same rate as other personal property under the laws of this State," is applicable only to the capital stock, and not to the calling or business of those institutions. VOORHIES, J. (with whom concurred BUCHANAN, J.), dissenting. *Ibid.*

7. Under the statutes of Mississippi, the trustees of insolvent banks are not restricted to the collection of such assets as are necessary to pay the debts of the corporation, but they have the right to collect all the assets and, after payment of debts, distribute the surplus among the stockholders. *Davis* v. *Robertson*, 752.

See INSOLVENCY—*Davis* v. *Robertson*, 752.

BATTURE.

1. The several Acts of the Legislature giving to the city police powers over the batture, were never intended to disturb the rights of property, and had such been the object of the statutes, they would to that extent have been nullities. *Remy* v. *Municipality No.* 2, 148.

2. On the 10th of September, 1820, M. & G. entered into an act of compromise, by which G. conveyed to M., with a warranty against his own act, all his right in a portion of the batture, in the faubourg St. Mary. By the terms of the act, the batture conveyed extended to the water's edge. On the 20th of September, 1820, G. made an act of donation to the city of New Orleans, by which the batture previously conveyed to M. was created *locus publicus*. Under the facts of the case, it was held, that for the purpose of the donation, G. was to be regarded as the *negotiorum gestor* of M., who was bound by the act granting the batture to the public. In 1851, the act of donation of September 20th, 1820, was, by agreement, rescinded. This action was brought by the heirs of M. against the heirs of G. to recover the proceeds of the batture sold by G. to M. in 1820, which proceeds were received by the heirs of G. under the Act of 1851, rescinding the donation of 1820. *Held*: The contract of 20th of September, 1820, so long as it endured, seemed to have been viewed by M. and by his heirs, as binding upon them; but when that donation was rescinded in 1851, and the *locus publicus* created by the contract of 1820 was again made the subject of private ownership, the warranty contained against their own acts in the conveyance of the 16th of September, 1820, unquestionably forbade the heirs of G. to put into their own pocket the proceeds of the land embraced in that conveyance to M. *Michon* v. *Gravier*, 596.

3. The course of the side lines of property, in front of which alluvion is formed, is of no consequence in the division of the alluvion formed subsequently to the conveyance or grant. The line of such division must be drawn in such manner, as that each of the contiguous riparian proprietors shall have such proportion of the alluvial soil as the total extent of his front line bears to the total quantity of the alluvial soil to be divided. C. C. 508. *Heirs of Delord* v. *New Orleans*, 699.

4. The mere omission to figure on the plan of the Delord estate the alluvion that may have existed in front of it, and to divide it among the heirs, cannot be construed into an abandonment of the ownership in favor of the public. *Ibid.*

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. Notary certified that notice to the defendant, endorser, was given through the post-office, by letter directed to "the parish of St. Charles, opposite the Red Church." There was no post-office at that place, but it was proved that a letter addressed to defendant, and directed as above, would have been sent to Taylor's post-office, some eight or ten miles from the Red Church, and seven miles from defendant's house, where most letters directed like this were sent. *Held*: That the notice was sufficient. *Barker* v. *Fullerton*, 25.

2. Demand of payment at the place where note is payable is sufficient. *Ibid.*

3. The certificate of the Notary did not show in what post-office the notice to the endorser was placed, but the protest being dated at New Orleans, it was held that the only reasonable inference was that the notice was placed in the post-office at New Orleans. *Ibid.*

4. Demand of payment of a check made in business hours, on the day succeeding that on which the check is dated, is a sufficient presentment. *Ocean Tow Boat Co.* v. *Ship Ophelia*, 28.

5. Plaintiffs were directed to apply to the agents of defendants for payment. The agents gave plaintiff's a check which was dishonored. *Held:* That the defendants were not discharged. *Ibid.*

6. The court will not presume that a note not dated, and bearing ten per cent. interest on its face, was executed on or before the day when the rate of interest was limited by law to 8 per cent. *Gautreau* v. *Verret*, 78.

7. Objection by drawer of a bill of exchange of insufficient demand of the acceptor. The notary went to the place of business of the acceptors, (*Wm. Laughlin & Co.*,) and finding it shut, made protest for non-payment, without making inquiry for the residence of the acceptors. *By the Court:* We consider the demand, within the usual business hours, at the commercial domicil of a partnership, for the payment of a note or bill due by the firm, a sufficient presentment. It was not necessary to make a further demand at the private residence of the individual partners. The place of business is the domicil of the firm, and it is their duty to have suitable persons there to receive and answer all business demands. We express no opinion as to the degree of diligence requisite, where the obligation is that of one doing business alone, and where the debtor has both a domicil and place of business, the latter being closed at the time of the presentment. *Watson* v. *Templeton*, 137.

8. Notice by the notary to the last endorser exclusively, is a strict compliance with commercial usage, especially if he be ignorant of the residence of the other parties. *Ibid.*

9. Where the distance is such as to require the interval of several days for the purpose of communication, then "the day" which each endorser is allowed, within which to give his notice in turn, will commence with that on which he himself receives notice. *Ibid.*

BILLS OF EXCHANGE AND PROMISSORY NOTES (*Continued*).

10. The Act of 1827 has not disturbed the well-settled rules of commercial law on the subject of notice of protest. Its object was to provide a new and convenient mode of proof.
Farmers' Bank of Kentucky v. *Stevens*, 189.

11. Nor is the form of notice material where the date, amount and names of the drawer and payee are mentioned. *Ibid.*

12. It is sufficient if the party to whom notice is sent is enabled to ascertain therefrom the nature and extent of the obligation which has become the subject of protest. *Ibid.*

13. As holders and absolute owners of a negotiable bill, the plaintiffs had a right, without qualification, to enforce payment from any of the parties to the instrument. *Ibid.*

14. The rule is well settled that where the maker of a promissory note cannot be found, payment must be demanded at his domicil, if within the State. *Penn* v. *Watts*, 205.

15. No notice of protest is necessary where the drawer of the bill has no funds in the hands of the drawee, and made no provision for its payment, nor had any right to expect that a bill for the amount would be accepted. *Anderson* v. *Folger*, 269.

16. The maker, or endorser, in an action on a note, in the absence of any equity existing against the payee, cannot question the title of the holder.
Ran v. *Latham*, 276.

17. The equities which defendant is entitled to plead, are such as operate in his own favor, not those which belong to a party to whom he is liable.—LEA, J. *Ibid.*

18. Plaintiffs sue to recover back the amount of a bill of exchange, which they had accepted and paid. *By the Court:* Plaintiffs, having paid the bill to defendants, cannot recover, unless they have established their allegation that there was a material alteration in the bill, by which they were defrauded out of their money. A mere alteration is not enough. They must show that it was such a fraudulent alteration in the substance of their contract as, *per se*, to destroy the obligation resulting from it. *Bullit* v. *Hewitt*, 327.

19. Where the notary, having no knowledge of the residence of the drawer, made enquiry on the subject, of the acceptor's factor, (who was also factor of the drawer,) and received for answer, that the drawer lived at F., for which place he mailed notices of the day of the protest, addressed to the drawer; and, a few days after, having received other information in relation to the drawer's residence, dispatched another notice to the place designated. *Held:* That the notary used such reasonable diligence as to excuse the want of notice. *Eager* v. *Brown*, 625.

20. This was an action against the drawer of a draft. It was held that the notice of protest was insufficient to charge him.
Curry & Person v. *Herlong*, 634.

21. Although the drawer may have no funds in the hands of the acceptor, yet, if upon taking up the bill he would be entitled to sue the drawee or

BILLS OF EXCHANGE AND PROMISSORY NOTES (*Continued*).

any other party on the bill, as if he be an accomodation drawer for the drawee or *payee*, or any subsequent indorsee, then, and in every such case, he is entitled to strict notice of the dishonor. *Ibid.*

12. G. transferred the negotiable note of N. to M. B. & Co., and took from them their written agreement to hold the note as collateral security for the payment of a debt due by G. to them, and G. transferred that agreement to S.—all having been done before the maturity of the note. M. B. & Co. having been paid the debt due them by G.—*Held:* That S., by virtue of the transfer of said agreement, took the note unaffected by any equities, in relation to it, existing between G. and N.

Nott v. *Watson et als.* 664.

13. As owner of one-half and usufructuary under the will of the other half of the note sued on, the plaintiff had the right to maintain an action to enforce payment. *Wood* v. *Hardy*, 760.

See PLEADING—*Langstaff* v. *Lees*, 271.
See SEQUESTRATION—*Horne* v. *Belcher*, 321.

BONDS.

See INJUNCTION—*Whitehead* v. *Tulane*, 302.

BOND TO MAKE TITLE.

1. Bond to make title to a lot of ground on which a church was being erected but in which the dimensions of the lot were not stated, and there being no proof from which it could be inferred what the dimensions were to be. *Held:* Defective as the foundation of title.

Short v. *Methodist Epis. Ch.*, 174.

BOUNDARY.

1. Where there is a discrepancy in the boundary lines, as shown by a public act on the one hand, and a plan attached to the act on the other, if the description be clear and unambiguous in the former, it will prevail.

Michon et als. v. *Gravier et als.* 596.

CASES COMMENTED ON, DOUBTED, AFFIRMED, OVER-RULED, &c.

1. Decision in *Hubgh* v. *The New Orleans and Carrollton Railroad Company*, 6 An., 495, affirmed. *Hermann* v. *Carrollton Railroad Co.* 5.

2. *Walton* v. *Beauregard*, 1 Rob. 301, is of doubtful authority.

Jackson v. *Williams*, 93.

3. Decision in *Purvis* v. *Harmason*, 4 An., 422, and *Thomas* v. *Phillips*, 7 An., 546, affirmed. *Farmer's Heirs* v. *Fletcher*, 142.

4. Decision in *State* v. *Johnson*, ante p. 422, affirmed. *State* v. *Kennedy*, 479.

5. *Cook* v. *Morehouse*, 6 An., affirmed. *Bartels* v. *Their Creditors*, 433.

6. Decision in the case of *Holmes* v. *Wiltz* affirmed.

Guzman v. *Walker*, 692.

7. Decision in *Kennedy* v. *Municipality No.* 2, 10th An.; *Remy* v. *The City*; and *Heirs of Gaiennié* v. *The Same*, 11th An. affirmed.

Heirs of Delord v. *The City of New Orleans*, 699.

CASES COMMENTED ON, DOUBTED, AFFIRMED, OVER-RULED, &c. (*Continued*).

8. Liability of maker of guarantee notes to the Merchants' and Planters' Mutual Insurance Company, fixed according to the principles laid down in the case of *McIntosh* and the same company. *Culbertson* v. *Hall*, 204.

9. Question of prescription—Decision in the case of *Remy* v. *The City of New Orleans*, 11 Annual, affirmed *Gaiennié* v. *2d Municipality of New Orleans*, 738.

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25. *Dreux* v. *His Creditors*, 7 N. S. *Devron* v. *His Creditors*, 482.

CITATION.

1. Action to remove administrators, domiciled in Mississippi. Exception—that there had been no citation. *By the Court:* This objection may be considered not only as waived by the other reasons urged for the dismissal of the action, but by the appearance of the appellees, whereby it became unnecessary to make service on the curator *ad hoc*, on whom alone it could be made, as the appellees were domiciled out of the State. *Succession of Penny*, 197.

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CLERKS OF COURT.

1. The clerks of the several courts do not continue to hold their offices after a general election until the new Governor enters upon the discharge of his duties. Article 149 of the Constitution only provides the day of their election, and does not fix the period when they shall cease to perform their duties. *Wiltz* v. *Derbes*, 50.

COMMON CARRIERS.

1. Action for non-performance of contract to deliver molasses "at the port of Louisville," etc. The molasses was landed at Portland, whence it was to be carried to Louisville under a contract made by defendants with steamboat Envoy. The molasses remained at Portland some time, and was there much damaged. *By the Court:* As Portland is shown not to be the port of Louisville, we think the obligation of common carriers rested upon the defendants until the goods were delivered at Louisville, and if the Envoy, or any other boat, neglected to take the molasses on board, it was the neglect of their own agents, for so much of the voyage as remained unaccomplished between New Orleans and Louisville. Neither could the plaintiffs be charged with the transportation of their freight through the locks to Louisville. *Watts* v. *Sbt. Saxon*, 43.

2. The common carrier is bound to the most exact diligence as much to avoid danger, which may be reasonably apprehended, as to rescue the property from present and imminent peril. *Ibid.*

3. The measure of the carriers' liability is the value at the port of destination of similar goods, delivered in good order.
Quadras v. *St'r. Daniel Webster*, 203.

4. Where, by the fault of the shipper, there was no bill of lading on board the vessel, so that the ship's agent did not know to whom to deliver the goods, and notice was published in a newspaper (taken by plaintiffs) that the ship was discharging, and subsequently the goods were stored with the ship's agent, where they were destroyed by fire, the ship will not be responsible. *Medley* v. *Hughes*, 211.

5. In an action against a common carrier, alleging non-delivery of goods, the plaintiff must give some evidence in support of the allegation.
Humphreys v. *Switzer*, 320.

6. The measure of the carrier's liability is the market value of the goods at the port of destination. *Grieff* v. *Switzer*, 324.

COMMON CARRIERS (*Continued*).

7. Action to recover damages for injury caused to goods by the bursting of casks containing chloride of lime. *By the Court:* Where the common carrier is unable to make good his defence upon some of the grounds which form exceptions to his liability, it is clear he must pay the loss, although not chargeable with any negligence whatsoever; and in fact, even where he has exercised every possible diligence to prevent the loss. He is also liable for a loss occasioned by an accident arising from any unseen nuisance in the course of his navigation.

Brousseau v. *Ship Hudson*, 437.

8. As the damage in this case was not caused by superior force, (*force majeure,*) or by accident, (*cas-fortuit,*) defendants are liable. *Ibid.*

9. Where hay was shipped, according to the bill of lading, in good order and condition, and on its delivery, at the place of destination, was damaged, it is incumbent on the owners of the vessel to show that the damage was not caused by bad stowage or want of care.

Ship Rappahannock v. *Woodruff*, 698.

10. A package of bank notes was delivered by the agent of plaintiff on board a steamboat for transportation, the amount of which was specified on the face of the package and the attention of the officers called to its value—*Held:* That *gross negligence* is fairly to be inferred, from the fact that the officers of the boat could give no account whatever of its disposition.

Boyd v. *Estis*, 704.

COMMUNITY.

1. Where the community is dissolved by the death of the husband, the surviving wife is presumed to have the intention to accept the community, and her right to renounce is subject to the same rules as govern the beneficiary heir. *Herman* v. *Theurer*, 70.

2. But a different rule prevails where a divorce has been pronounced. Unless the wife accepts the community within the delay allowed by law, and obtains from the Judge a prolongation of that delay, she is supposed to have renounced the community. *Ibid.*

3. The omission to inventory the community property, will not annul or suspend the usufruct established in favor of the surviving spouse, by the Act of 25th March, 1844. *Succession of Viaud*, 297.

4. The community is entitled to the enjoyment of the property and effects belonging to the husband at the time of the marriage, and owes no recompense for the diminution in value of such effects by reason of such enjoyment. *Ibid.*

5. Furniture and other movables brought into marriage, if they still exist in *specie*, may be taken out at the dissolution of the community by the husband who brought them, but he is not entitled to credit for their value at the date of the marriage. If they have perished, the husband must bear the loss. If they have been alienated, upon showing that the proceeds went into the community, the husband can charge the sum to the community. *Ibid.*

COMMUNITY (*Continued*).

6. The legal presumption is that a slave, bought by the plaintiff pending the community of *acquests*, is community property, and the unsupported declaration in the act of sale that the purchase money was given to the plaintiff by her father, cannot conclude creditors who were not parties to the act. *Forbes* v. *Forbes*, 326.

7. When a judgment of separation from bed and board is rendered, the husband ceases to be the head of the community, and one undivided half of the property thereof vests immediately in each of the spouses, who thereby become joint owners; the wife having in this case continued to possess *nomine communi*, is accountable for the fruits of the property. *Dorvin* v. *Wiltz*, 514.

8. A claim, by the wife, for expenditures prior to the dissolution of the community, is inadmissible—it being neither alleged or proved that those expenditures were made with her separate or paraphernal funds. *Ibid.*

9. Where the wife bore all the charges of the support of the family and the education of the children, she is entitled to claim one-half of the amount from the husband, on a settlement of the community. BUCHANAN, J., dissenting. *Ibid.*

10. The income of the separate estate of one of the spouses belongs to the community. C. C. 2371. BUCHANAN, J., dissenting. *Ibid.*

COMPENSATION.

1. Defendant held a sum of money belonging to W., and refused to pay it over, under wholly unfounded pretences, for three years, when he acquired a protested note on which W. was endorser—which he pleaded in compensation of the debt due to W. *By the Court:* The allowance of the plea, under all the facts of the case, would be subversive of that good faith upon which the doctrine of compensation reposes. *Bogert* v. *Egerton*, 73.

CONFLICT OF LAWS.

1. An infant, or minor born out of wedlock, son of a resident of Arkansas, was, by an Act of the Legislature of Arkansas, legitimated, or put upon the same footing, as if his parents had been married at the time of his birth. The question was, whether he could inherit, as a legitimate child, property in Louisiana.—*Held:* The heritable quality of legitimacy which W. E. had received from the Legislature of the State of his residence, accompanied him when he changed his domicil. *Scott* v. *Key*, 232.

2. A general law of the place of domicil, changing the *status* of its citizens according to circumstances, is a personal statute, accompanying the party to every other country; provided the circumstances which operate such change, have occurred before the change of domicil. So, a special law, removing a disability from a particular citizen by name is such a personal statute. *Ibid.*

CONFLICT OF LAWS (*Continued*).

3. The Legislature of Arkansas gave to W. E. the *status* of a Legitimate son of S. E., and this *status* accompanied W. E. into whatever country he might go. *Ibid.*

4. W. E. came hither with his *status*. He inherited, *by our law*, from his father S. E., because he was, to all intents and purposes, a legitimate son, having become so by the law of the domicil of his origin, and not in fraud of our law, nor in violation of its policy. *Ibid.*

5. The statute of Arkansas must have as much effect, and no more, as a general law of that State would have, wherein it should be declared that all natural children born, or resident in the State of Arkansas, should be considered as legitimate and inherit from their fathers the same as if born in wedlock. Were such an Act allowed to have any extra territorial effect, another State would be permitted to provide a new class of heirs for immovables and successions in Louisiana.—MERRICK, C. J., dissenting. *Ibid.*

6. Foreign jurists class statutes in regard to legitimacy or illegitimacy, as personal. But, in principle, such statutes should have effect only where they cure some want of formality in regard to the marriage of persons who have really lived together as husband and wife, and not where at most they create a purely fictitious *status*.—MERRICK, C. J., dissenting. *Ibid.*

7. Conceding the statute of Arkansas to be a personal statute, it is against the policy of our laws to enforce it to the exclusion of the heirs at law, as regulated by the Civil Code.—MERRICK, C. J., dissenting. *Ibid.*

8. There can be no safe rule except to consider those only as legitimate children whose parents have at some time lived together as man and wife. *Hæres et filius est quem nuptiæ demonstrant.* The Civil Code designates what persons shall inherit, and when a person presents himself, who has not the qualities required by our law, except in an absolute fiction created by the statute of another State, the real facts of the case should be looked at, and the inheritance given to those entitled under our own laws.—MERRICK, C. J., dissenting. *Ibid.*

9. In ordinary cases the decisions of the State courts, upon the construction of State laws, not involving questions under the Constitution of the United States, are authoritative. But in a case like this, where there is difference of opinion between the Supreme Court of the United States and the Court of Errors of Mississippi, it is a good reason for following the former, that it is more in harmony with the jurisprudence of Louisiana. *Davis* v. *Robertson*, 752.

See HUSBAND AND WIFE—*Bone* v. *Sparrow*, 185.

CONSTITUTIONAL LAW.

1. The Act of 1853 is entitled "an Act to provide for the removal of certain public records from the Fourth District of New Orleans to the Parish of Jefferson," and the Act of 1854 is entitled an Act amendatory thereof. Each section in both of these Acts has direct reference to the subject matter of its legislation, or its necessary incidents. It certainly was not necessary to meet the requirements of the Constitution, for the

CONSTITUTIONAL LAW (*Continued.*)

Legislature to pass two separate Acts for the purpose of accomplishing one object—the first in order that a thing should be done, and the second to indicate the manner in which the expense should be defrayed.
Arnoult v. *New Orleans*, 54.

2. The title of the amendatory Act not only refers to but includes the title of the first Act. The Constitution does not prohibit any designation of an amendatory Act by a reference to the title of the Act amended.
Ibid.

3. The object of the Constitution was to prevent the amendment or revival of laws *merely* by reference to their title. It was intended that each amendment and each revival should speak for itself and stand independent and apart from the act revived, or section amended. *Ibid.*

4. The license tax imposed on keepers of coffee-houses is imposed upon all persons of the same class, and is therefore constitutional.
New Orleans v. *Staiger*, 68.

5. The reasons for the judgment rendered by the District Court were: "This case having been regularly taken up according to assignment, and after the testimony adduced, and argument of counsel, it is ordered," etc. *By the Court:* This, it is apparent, is as much a reason for rendering a judgment in favor of the defendant as plaintiff, and does not meet the requirements of the Constitution. Article 72, Constitution.
West Baton Rouge v. *Bozman*, 94.

6. The 41st section of the charter of the city, which dispenses the city from furnishing bond and security in all judicial proceedings, "where, by existing laws, bond and security are required of litigants," is not unconstitutional, as being without the terms of the title of "the act to consolidate the city of New Orleans, and provide for the government and administration of its affairs." The 41st section does not revive or amend any law by reference to its title. It refers to laws in general terms without any indication of the title of such laws.
Kathman v. *New Orleans*, 145.

7. Article 127 of the Constitution of 1845, and 123 of the present Constitution, refer to State taxation in its proper sense, for general or State purposes. When it says that taxation shall be equal and uniform *throughout the State*, it points directly to its object, which is to regulate the mode of filling the State Treasury. It does not take away the power of making local assessments for local improvements, upon the equitable principle that he who reaps the benefit must bear the burden.
Yeatman v. *Crandall*, 220.

8. The power of the legislative department of the government is supreme, except where restricted by the Constitution.
New Orleans Draining Company praying, &c., 338.

9. The Legislature has the power to drain the swamps in the rear of the city of New Orleans, directly, or by its own agents, and so it has the power to drain them through the intervention of a company created for that purpose. *Ibid.*

CONSTITUTIONAL LAW (*Continued.*)

10. Article 124 of the Constitution, guaranteeing to the city of New Orleans the election of its own officers, was not intended to direct the manner in which contractors for works of public improvement should be selected, nor to abrogate contracts already made. It is the right of appointing the several *public* officers necessary for the administration of the police of the city that is secured to the citizens of New Orleans. The kind of officers intended is shown by the proviso to Article 124. An incorporated company taking a contract for the draining of a swamp cannot be called a public officer necessary for the administration of the police of the city. *Ibid.*

11. It was within the power of the Legislature to require the proprietors of the marshy lands in the rear of the city themselves to drain them. It had the power also for sufficient causes, of which the Legislature alone was the judge, to cause the work to be done and charged to the proprietors respectively, and all this would not be the levying of a tax in the sense of that word as used in the Constitution. The money was not intended to go into the treasury, and become subject to the rules by which alone it could be appropriated annually. *Ibid.*

12. The property drained has been benefited in amount greater than the cost of the assessed work. Were not this the case, the property of each proprietor, to the extent of the difference between the increased value and the cost of the work assessed to him, would be taken for a purpose of public utility without adequate compensation previously made, and consequently there would be a violation of the provisions of Article 105 of the Constitution. *Ibid.*

13. Under the charter the estimate that the company was required to make of the probable cost of the work, did not limit the lien to the amount of the estimate, should the cost of the work exceed the estimate. *Ibid.*

14. It is in the power of the Legislature to determine in what manner parties are to be brought into court. *Ibid.*

15. If the estimate of the cost of the work was irregular, such irregularity has been cured by a judgment of a competent tribunal, which has not only become final, but has been acquiesced in by the parties, who daily saw the work upon their own land in progress, and who made no objection or remonstrance. *Ibid.*

16. By the charter of the company the cost of drainage was levied, not as a personal tax upon the individual proprietor, but as an assessment against the property benefited by the labor of the company, and to repay the company, not to go into the public coffers. And for the benefit which it was supposed the city would derive in point of salubrity from the improvement, the municipalities were required to keep the draining machinery in perpetual operation, without any extra tax on the lands. SPOFFORD, J. *Ibid.*

17. All the rights of the company were acquired under the Constitution of 1812; these were reserved by the schedules of the Constitutions of 1845 and 1852, so that the clauses in the Constitutions of 1845 and

CONSTITUTIONAL LAW (*Continued.*)

1852, which are not to be found in the Constitution of 1812, touching "vested rights" and the "equality and uniformity of taxation," can have no bearing upon these rights. SPOFFORD, J. *Ibid.*

18. To go behind the Constitution of the State and of the United States, in search of an unwritten bill of rights, which is said to lie at the foundation of every free government, and there to find a principle on which the legislation in question may be declared null and void, would be to prostrate the plainly declared will of a co-ordinate department of the government, not because it contravenes any provision of the organic law, which the court is to expound, and all are to obey, but because it contradicts the notions of justice that the court may entertain. SPOFFORD, J. *Ibid.*

19. Perhaps the court has such a power; like the right of revolution, it is sometimes obscurely hinted at in judicial opinions. Conceding that the court has the power to protect the citizen against encroachments from the legislative power which are not specially, or by necessary implication, inhibited by the Constitution, it is obvious that a flagrant case of wrong and hardship should be made out to justify a judicial tribunal in thwarting the legislative will, without a direct warrant for doing so to be found in the Constitution itself. SPOFFORD, J. *Ibid.*

20. The charter of the New Orleans Draining Company is unconstitutional in this, that it levies a tax only upon the owners of the property drained, for an improvement intended for the benefit of the whole city of New Orleans, and so declared to be in the preamble to the charter. BUCHANAN, J., dissenting. *Ibid.*

21. The power conferred upon the Draining Company by the Act of 1839 is a power of taxation, which it is unconstitutional for the Legislature to delegate to a joint stock company, and is inconsistent with the taxing power vested in the Municipal Corporation by the various acts incorporating the city of New Orleans, which are not repealed. BUCHANAN, J., dissenting. *Ibid.*

22. The inscription of a mortgage and privilege for an undefined amount, in favor of the Draining Company, against each and every proprietor of land embraced within the company's operations, seems to be a divestiture of vested rights, because it must render all property thus situated unsaleable in the interval between the inscription of the decree creating the mortgage and privilege before the work is undertaken, and the homologation of the assessment and tableau of contribution after the work is completed. BUCHANAN, J., dissenting. *Ibid.*

23. The superiority which is given by the Act of 1839 to the mortgage and privilege of the company on the lands embraced in their operations, over all mortgages, conventional, legal, or judicial, is a provision divesting vested rights and impairing the obligation of contracts. BUCHANAN, J., dissenting. *Ibid.*

24. The 4th section of the Act of 12th March, 1838, re-enacted in 1855, which provides that managers and lessees of theatres shall pay $500 per annum for the benefit of the Charity Hospital, is not unconstitu-

CONSTITUTIONAL LAW (*Continued.*)

tional; nor is it repealed by the Act of 1853, taxing managers and lessees of theatres $200. *Charity Hospital* v. *De Bar*, 385.

25. An assessment on property in New Orleans, in front of which paving has been done, of a portion of the cost, is not forbidden by the Act of 4th May, 1847, section 1; such an assessment is not opposed to the letter or spirit of Article 427 of the Constitution of 1855, and Article 123 of the Constitution of 1852. *Surgi* v. *Snetchman*, 387.

26. However specious the argument that the Governor should, if possible, seek to avail himself of the assistance of his constitutional advisers, the Senate, in making appointments to office, and to avoid an independent nomination, which would only have effect until the end of the next session of the Legislature, it is plain that an appointment thus made by anticipation, has no other basis than expediency and convenience, and can only derive its binding force from the supposition that there will be no change of person, and consequently of will, on the part of the appointing power, between the date of the exercise of that power by anticipation, and that of the necessity for the exercise of such power by the vacancy of the office. *Ivy* v. *Lusk*, 486.

27. It is entirely inadmissible to pretend that the Governor and Senate can forestall the action of their own successors in office, upon executive appointments to the offices, of which the term shall expire during their possession of the reins of government. *Ibid.*

28. An Act of the Legislature, directing the sheriff of a parish to assess and levy a tax within a school district of the parish, to pay a judgment against the school directors of such district, is not unconstitutional. *Bassett* v. *Barbin*, 672.

29. The Act of 15th of March, 1855, entitled "an Act relative to slaves and free colored persons," is unconstitutional, because its title expresses two distinct objects, to wit: slaves and free colored persons, and because many of the sections of the Act embrace objects not expressed in the title. *The State* v. *Harrison, a slave*, 722.

30. Slaves and free colored persons embrace two classes, which it is impossible to confound in legal parlance; for in the eye of the Louisiana law there is, with the exception of political rights, social privileges and the obligations of jury and militia service, all the difference between a free man of color and a slave, that there is between a white man and a slave. *Ibid.*

31. This court cannot say, that one of the objects comprised in the title of the Act in question, was more in the contemplation of the Legislature than the other, nor select between the two objects expressed, and to sustain those portions of the statutes which are applicable to the object they selected, to the exclusion of the other expressed object, not to speak of the other and widely various objects embraced in the numerous sections of the statute. The whole Act is liable to the same objection, and the whole is void for unconstitutionality. *Ibid.*

32. The doctrine of all American courts is, that a Legislative Act should not be declared void, unless its incompatibility with the paramount law be

CONSTITUTIONAL LAW (*Continued.*)

clear beyond a reasonable doubt. SPOFFORD, J., (with whom concurred LEA, J.,) dissenting. *Ibid.*

13. The argument that slaves are one object, and free colored persons another, overlooks the fact that both compose a single, homogeneous class of beings, distinguished from all others by nature, custom and law, and never confounded with citizens of the State. No white person can be a slave; no colored person can be a citizen. A slight change of phraseology without any change of substance, will show that there is unity in the object of the law in question, as indicated by its title; it is an act *relative to persons of color whether bond or free.* The division of this class of persons into bond and free, does not duplicate the object of the law which was intended to regulate the entire class. SPOFFORD, J., (with whom concurred LEA, J.,) dissenting. *Ibid.*

14. The design of a title is merely to indicate the general subject of the law, and not to furnish a detailed exposition of its provisions. If the latter were the case, it would lead us to the absurd conclusion that the title should be as long as the act, unless indeed the act abounded in tautology and surplusage. What good sense would dictate is what the Constitution exacts, namely, that by some general but concise expression at the head of the law, the attention of both legislator and citizen should be fixed upon the main subject-matter to which all the details in the body of the statute are auxilliary. SPOFFORD, J., (with whom concurred LEA, J.,) dissenting. *Ibid.*

35. In a suit, instituted by a citizen of another State, to recover slaves from a citizen of this State, which he alleges are fugitives from his service, the slaves have, in the eye of the law, no interest in the result of the suit. The 2d section of Art. 4th of the Constitution of the United States does not contemplate a case of this kind. Were the Constitution construed otherwise, it would apply to all questions of ownership in slaves, between citizens of different States.

Reynolds v. *Batson*, 729.

See NEW ORLEANS—*Arnoult* v. *New Orleans*, 54.
See LEVEES AND ROADS—*Yeatman* v. *Crandall*, 220.
See RAILROADS—*Pontchartrain R. R.* v. *Carrollton R. R.*, 258.
See SHERIFF—*Bell* v. *Hufty*, 303.

CONTINUANCE.

1. The non-attendance of jurors who had been summoned, but not excused, is not good cause for a continuance. *State* v. *Johnson*, 422.

2. Where a bill of exceptions, taken to the refusal of a judge to grant a continuance in a criminal case, shows that there were matters of fact known to the judge, which, though they do not appear, may have had an important bearing on the decision of the question of continuance, the Supreme Court will not interfere. *State* v. *Ballerio*, 81.

CONTRACTS.

1. A right of way for a railroad was granted by the owner of land on the Mississippi to a proprietor in the rear, and an acre of ground leased for a depot, etc. Subsequently, by order of the proper parochial authorities, a new levee was constructed, and the greater portion of the land for the depot was thrown outside of the levee, and consequently the public road,

CONTRACTS (*Continued.*)

and so rendered useless for the purposes for which it was leased. Suit was brought to compel a surrender of an additional piece of land, to be used for a depot in lieu of that rendered useless. *By the Court:* The contract in question is not so much a lease as the creation of a servitude, or right of way from plaintiff's plantation to the river's bank for a term of years—a predial servitude in favor of plaintiff's estate, and due by defendant's estate. This right of way is of a particular character—a railroad, an indispensable part of which is a depot at the landing. The dimensions of the depot are precisely defined by the contract, and the lessee has the right to a depot of that size to the expiration of the term, fronting on the public road, and running back from that road for quantity. *Smith* v. *Buhler*, 98.

2. The caving of the bank of the river, and hence the necessity for a new levee, etc., might have been foreseen (as shown by the evidence) and the parties must be supposed to have contracted with reference to such a contingency. *Ibid.*

3. In commutative contracts the party who seeks to put the other in default, must, on his part, perform all that which is incumbent on himself to perform. *Lafourche* v. *Rossi*, 102.

4. If the intention of the parties to a marriage contract cannot be discovered by the ordinary rules of interpretation, the contract must be declared void for uncertainty. *Stratton* v. *Rogers*, 380.

5. Plaintiff was liable on certain notes on which M. was primarily bound. M. died; and plaintiff having applied for the curatorship of M.'s estate, was induced to withdraw his application at the instance of defendant—who having an interest in the estate of deceased—agreed to deliver a certain quantity of lumber to plaintiff, at certain designated times, equal to the amount of the notes. *Held:* there is nothing immoral in such a contract; and defendant having failed to deliver all the lumber within the stipulated period, his liability to plaintiff is absolute for the amount of the notes, less the value of the quantity of lumber actually delivered. *Woodworth* v. *Wilson*, 402.

6. *Quære.* Whether it is not against the policy of the law to enforce any contract which directly or indirectly has for its consideration the withdrawal of the applicant for the office of Executor, Curator, or Administrator of a succession, in order to secure the appointment to another?—MERRICK, C. J. *Ibid.*

See DAMAGES—*Vanhorn* v. *Templeton*, 52.
See RAILROADS—*Pontchartrain R. R.* v. *Carrollton R. R.*, 258.

CORONER.

See SHERIFF.

COSTS.

1. A liability for judicial costs is solidary. By Art. 2082 it was not contemplated that a distinction should be drawn between the liability of plaintiffs and of defendants for costs. *Dunbar* v. *Murphy*, 718.

2. Art. 3503, C. C., refers exclusively to the fees of Parish Judges, Sheriffs, Clerks and Attorneys—compensation due to experts is not included. *Ibid.*

COURTS.

1. It is impossible to lay down any definite rules limiting the discretion of a court in ordering or maintaining such steps as may be necessary for the protection of the persons or property of minors. Cases may arise for which the law has made no specific provision, and in such cases, it is the duty of the court, in its discretion, to order such steps as may afford effectual protection; but for all the ordinary purposes of administration, the interests of minors are placed under the control of tutors and under-tutors, acting under the supervision of the court.

Succession Landry, 85.

2. All cases are excluded from the jurisdiction of the First District Court of New Orleans, which do not come within the definition of criminal cases, as found in the sixth section of the Acts of 1853 and 1855—"prosecutions for crimes, misdemeanors and offences committed within the limits of the First Judicial District."

State v. *The Judge of the First District*, 187.

3. The 42d section of the Act of 1855 does not give the First District Court of New Orleans jurisdiction to try a contested election of District Attorney of the parish of Orleans. *Ibid.*

4. If the 42d section of the Act of 1855 applies to the parish of Orleans, the section would be satisfied, without conflicting with previous statutes, by filing the petition contesting the election of District Attorney for the parish of Orleans in any of the five district courts of general jurisdiction in the parish of Orleans. *Ibid.*

5. The First District Court, being a court of limited powers, any extension of its jurisdiction must be strictly construed, and should not be stretched by implication to cases not named. *Ibid.*

6. Courts will not lend their aid to foster, circuitous, idle and wasteful litigation. The only real complaint plaintiffs have, is that they anticipated the payment of what afterwards became a debt. As the debt was due when they brought their suit, there was no equitable ground for repetition, in the fact that they paid it under a mistaken belief that they owed it before they really did. *Hyde* v. *New Orleans*, 191.

7. As between two executors, the action of the court cannot be invoked for the purpose of assessing their proportionate shares of a liability growing out of a joint fraudulent administration. *Girod* v. *Pargoud*, 329.

8. A State Court may enjoin the United States Marshall from seizing the property of one person under an execution against another.

Mock v. *Kennedy*, 525.

9. An action for the revendication of immovables is a real action, and an action to compel a conveyance of lands falls within this category.

The State courts of Louisiana have no jurisdiction to compel a conveyance of lands situated in Texas—and, *by the Court:* When the plaintiff entered into a Texas partnership in Texas land claims, he impliedly submitted himself to the Texas laws and tribunals. His attempt to bring those titles before the courts of Louisiana for adjudication, either directly or indirectly, is not to be favored, as it is not necessary for the due enforcement of our own laws, nor for the suppression of fraud

COURTS (*Continued.*)

within our borders. Aside from matters confided to the Federal Government by its Constitution, the relation of the States of this Union, *inter se*, is that of foreign States in close amity. Each is sovereign in its proper domain. If we would secure respect for our own sovereignty, we should pay respect to the sovereignty of others.

Mussina v. *Alling et als.*, 568.

10. Plaintiff claims to have been a joint owner with two of the defendants of certain lands in Texas. He charged a combination of his co-defendants to defraud him of his interest in those lands, and brought this suit for damages resulting therefrom. But *held* that, so far as the record disclosed, there was a title paramount to that under which plaintiff claimed. *Held, also*, that there was no proof that he was entitled to damages. *Ibid.*

See PRACTICE—*Julia Haughton* v. *Her Husband*, 200.
(For Appointment of Liquidator) See PARTNERSHIP—*Pratt* v. *McHatton*, 389.
See EVIDENCE—*Anderson* v. *Folger*, 269.
See CONSTITUTION—*N. O. Draining Co., praying, etc.*, 338.

CRIMINAL LAW.

1. A bench warrant need not be signed by the Judge. The entry on the minutes is the judicial order; the affixing the seal and signature of the Clerk are merely ministerial. *State* v. *Martinez*, 23.

2. "Selling liquor to slaves, without the consent of their masters," is a penal offence under the statute of 1852. *Ibid.*

3. In a bail bond it is not necessary to describe an offence with the certainty required in an indictment. *Ibid.*

4. The statute of 1852 punishes the offence of "selling liquor to slaves, without the consent of their masters," by fine and imprisonment. The State has the right to the presence of the accused on the trial for such offence, and the accused cannot plead, or be tried by attorney, at least without consent on the part of the State. *Ibid.*

5. Where a bill of exceptions, taken to the refusal of a Judge to grant a continuance in a criminal case, shows that there were matters of fact known to the Judge, which, though they do not appear, may have had an important bearing on the decision of the question of continuance, the Supreme Court will not interfere. *State* v. *Balierio*, 81.

6. The accidental omission of some names from the jury-list will not furnish a sufficient ground for challenging the array; to make a perfect list would be impracticable, and to construe the law so as to require it, would operate an indefinite suspension of the trial by jury. *Ibid.*

7. A party under indictment has not the right to move for attachments against absent persons, whose names are found on the jury list, in order to bring into court a greater number of jurors, when there are enough in attendance to complete the panel. *Ibid.*

8. It is good cause of challenge in capital cases that a juror has conscientious scruples against finding an unqualified verdict of "guilty." *Ibid.*

9. In determining the guilt or innocence of a party indicted, the jury are the judges of the law as well as the facts, but not in exactly the same sense. Under our statute, they are the exclusive judges of the facts; they are,

CRIMINAL LAW (*Continued.*)

subordinately, judges of the law, because the statute proceeds upon the assumption that they are not familiarly conversant with it, and therefore requires the presiding Judge to "give them a knowledge of the law applicable to the case." They have power to decide against the Judge's opinion of the law—nay, they have power to pervert or ignore the law itself by their decision, and no penalty awaits them. But as they cannot trample on the law without spurning the obligation of their oaths, so they cannot in general overrule the authoritative exposition of the law given by the Judge, without endangering the cause of justice, and forgetting the theory upon which its administration is based. The theory is, that the complicated duties of a criminal trial should be so parcelled out amongst various officers as to give to no one man or set of men unqualified and arbitrary control over the life and liberty of the citizen and the welfare of the State. After hearing the arguments on both sides, the Judge, unbiassed by interest or passion, is expected to declare the law; the jury to apply it to the facts which they find. They may safely take the law from the Judge, for, if he mistakes it to the prejudice of the prisoner, the latter is not without remedy: his exceptions may be heard in another tribunal, after the excitement of the hour is past. But the error of the jury is subject to no such revision. *Ibid.*

10. The following charge to the jury was asked and refused: "In all criminal cases the jury are the judges of the law as well as the facts. The province of the judge is to explain the law, and they are bound to listen to and weigh such explanation with due care and attention, although not bound to admit it as conclusive of the law, should they differ in opinion from the judge." *By* MERRICK, C. J., *dissenting:* I think the instructions should have been given the jury as prayed for. *Ibid.*

11. Appeal from a judgment overruling a motion in arrest of judgment after conviction of murder, on the ground that the words "then and there" were omitted in the concluding sentence of the indictment. *Held*: That if such indictment were defective at common law, it is aided by the statute of 1855, which provides that it shall not be necessary to state any venue in the body of an indictment; and that no indictment shall be held insufficient for want of proper or perfect venue.

State v. *Wilson*, 163.

12. Under the same statute any formal defect apparent on the face of the indictment must be taken by demurrer or on motion to quash before the jury is sworn; and every court before which objection is taken for such formal defect, may, if necessary, cause the indictment to be forthwith amended, whereupon the trial may proceed as if no such defect had existed.

Ibid.

13. Objections to the admissibility of the prisoner's confession, and to the instructions of the court, must be taken by bill of exception, and not by assignment of error. And where the Justices who presided at the trial of slaves, were of opinion that they had no power to sign bills of exception, evidence of this should appear of record.

State v. *Bob*, 192.

CRIMINAL LAW (*Continued.*)

14. Assignment of error, "that the tribunal who convicted said slave were informally and illegally constituted." *By the Court:* This objection is entirely too vague and has not been made more explicit by any specification, even in argument, in this court. *Ibid.*

15. It is good ground of challenge in a capital case that the juror has conscientious scruples against capital punishment. *State* v. *Costello*, 283.

16. The court has a right to discharge the jury in a capital case, when such discharge is of evident necessity; and by necessity is not meant that which is physical only, but it has application to cases of moral necessity, as where the ends of justice would of necessity be frustrated, or where it arises from the impossibility of proceeding with the case, without producing evils which ought not to be sustained. *Ibid.*

17. The jury empannelled and sworn to try the prisoner on an indictment for murder, before the indictment was heard or evidence received, was, on the suggestion of prisoner's counsel, and with the written consent of the prisoner, allowed to separate—the District Attorney reserving his right, with the consent of prisoner's counsel, of making his objection the next day, should he think it important to do so, and to move for the discharge of the jury. On the next day the District Attorney, considering the separation of the jury illegal, moved for the discharge of the jury, which was accordingly ordered. Another jury was subsequently empannelled for the trial of the prisoner, when his counsel filed a plea in bar, alleging that having been once put in jeopardy of his life, he could not be tried by a different and distinct jury. There was a verdict of guilty. On appeal—*Held:* the separation of the jury, under the jurisprudence of this State, would have vitiated the verdict they might have rendered. The motion to discharge the jury was made in good faith; the discharge of the jury was without prejudice to the prisoner's rights; the prisoner stood before the second jury with every advantage he enjoyed when the first jury was empannelled. The conviction was valid. *Ibid.*

18. On a trial for murder the Judge told the jury that "murder is of very frequent occurrence in this community, and when a jury has a case of murder which is clearly made out, the court believes it necessary for a jury to bring in an unqualified verdict in order to deter others from crime." *By the Court:* Such a charge was calculated to impress upon the minds of the jurors that in all cases of murder they were not at liberty, or, at least, could not with propriety exercise that discretion which is expressly conferred by the statute of 1846, which declares that in *all cases* where the punishment demanded by law is death, it shall be lawful for the jury to qualify their verdict by adding thereto, "without capital punishment." We think the discretion of the jury should not have been trammelled by the instructions which were not only calculated to secure an unqualified verdict, but might have been construed by the jury into an intimation of the opinion of the court as to the guilt or innocence of the prisoner. *State* v. *Shields*, 395.

19. Generally speaking the Supreme Court is inhibited by the restraints of the Constitution from entering upon such inquiries as are necessary to determine a question of continuance in a criminal case. In such cases its jurisdiction is limited to questions of law alone. The propriety of granting or withholding a continuance in most criminal cases, depends wholly upon facts within the knowledge of the District Judge, but not cognizable in the Supreme Court. The only proper mode of bringing the subject before the Supreme Court, is by a bill of exceptions which will show affirmatively upon its face that the ruling of the District Court was predicated exclusively upon a matter of law in which the court erred.
State v. *Johnston*, 422.

20. A bill of exceptions was taken to the refusal of the District Judge to grant a continuance because the prisoner had been served with a list of jurors, upon which were the names of three jurors who had been excused for the term, prior to the service of the jury list. *By the Court:* Although in these matters affecting life and liberty, the clerks of courts cannot be too particular in the discharge of their duties, and should be held to strict accountability for their negligence, still we are not prepared to say that the accidental insertion of the names of three jurors who had been excused for cause in a list of eighty two, could have confused or embarrassed the prisoner in regard to his challenges. Before the trial he knew that those three were excused. He averred no surprise. He did not allege that the absence of the three jurors entailed any embarrassment upon him in getting an impartial jury. We have no reason to suppose that he was surprised or confused by the failure of the clerk to omit the names of three excused persons. All the jurors who had been summoned, aud none who had not been summoned, figured upon the list; and we think the statute requiring a list of the jury who are to pass upon his trial to be served upon the prisoner, was sufficiently complied with. *Ibid.*

21. Bill of exceptions to the refusal of the court to charge that "the jury are not the judges of the law and fact in a criminal case, but must take the law as laid down by the court"—*Held:* The charge asked for was erroneous. *By the Court:* In both civil and criminal cases, the jury are judges of the law and the fact; otherwise it would be impossible for them to render a general verdict in any case.
State v. *Scott*, 429.

22. It is in general safe, as it is in conformity with the theory and the presumptions of our criminal jurisprudence, for the jury to regard the exposition of the law given by the court as correct and decisive—but they are under no compulsion to do so. They not only have the physical power to disregard the instructions of the court, but there might be extreme cases where it would be right to exercise the power. Still the statutes require the Judge to expound the law to the jury and, in general, they will do well to heed it as authoritative. *Ibid.*

23. When the prisoner provokes an inquiry into the character of the deceased he cannot complain that the State, on re-examination, seeks to obtain

CRIMINAL LAW (*Continued.*)

from the same witness evidence of a general character calculated to rebut the unfavorable impression produced by the answers of the witness to the prisoner's questions. *State* v. *Bass*, 478.

24. The prosecuting officer always has the right to open the argument of the cause. If the prisoner offer no evidence, it seems that it is usual for the argument to cease with the reply of his counsel to the argument of the prosecuting officer. But the prisoner's counsel is not entitled to open the argument upon the merits before the jury, in any case, as a matter of right. *Ibid.*

25. Bill of exceptions to the order of the judge directing the clerk to commence calling the jury list at No. 70. *By the Court:* The industry of counsel has not furnished us with any adjudged case, nor have we been able to find any, in which it has been held that it was error if the jury were not called to the book in the order in which they were placed on the list served upon the accused. There is nothing in the statute which directs the order in which the jury are to be called to be sworn, nor which requires the names to be set down on the list in the order in which they are drawn, although that is the more regular and natural mode of transacting the business. The statute which provides that the accused shall be furnished with a list of the jury who are to pass upon his case, at least two days before his trial, does not require that the list should be numbered. Yet, we believe the practice is almost universal, (and it ought not unnecessarily to be departed from) to number the list, and in capital cases to call the jurors in the order of their number. It is not sufficient for the accused to show a mere irregularity in the manner in which the jury is called—he should show that he has been prejudiced by the action of the court in that particular.

State v. *Kennedy*, 479.

26. The Act of May 29, 1856, authorizing juries, in capital cases, to qualify their verdicts of guilty by adding "without capital punishment," did not change the pre-existing jurisprudence which held it to be good cause of challenge on the part of the State in such cases, that the juror had conscientious scruples about inflicting capital punishment.

State v. *Melvin*, 535.

27. The following bill of exceptions was taken to the charge of the District Judge. "Be it remembered that on the trial of this cause, the Judge, in his charge to the jury, and at the beginning and in the course of his said charge, stated to the jury that cases of murder were fearfully numerous in this city; that a conviction on a charge of murder had ceased to be a cause of excitement, and had become a common affair of almost daily occurrence; that confinement in the State penitentiary for life was no adequate punishment for the crime of murder, and that juries had no right to qualify their verdict unless there were mitigating circumstances; that convicts in the penitentiary seldom served out their term, when confined there for life; that a late Governor of this State had pardoned almost every body, and that convicts were always in the hope that after a few years they would appeal to a clement executive, and that none but capital punishment would put a stop to the practice

CRIMINAL LAW (*Continued.*)

now common of man and woman killing; that he, the Judge, on a late visit to the penitentiary, had been told by parties sentenced by him, inmates of the State prison now, that they hoped in a short time to come out; to which charge the counsel for the defendant objected, &c." *By the Court:* It is obvious that the charge as above detailed embraced several matters of fact within the personal knowledge of the Judge, which would not have been admissable in evidence, had they been offered on the trial, which did not contribute in any way to the elucidation of the law applicable to the case, and which yet had a tendency to influence the finding of the jury by motives extraneous to the cause before them. *Ibid.*

28. Under the statutes of this State, the Judge should carefully avoid giving the jury any indication of his own opinion touching the facts of the case, or the guilt, or innocence of the prisoner. *Ibid.*

29. The qualification of the verdict in capital cases should be left where the law has left it, to the sound discretion of the jury, upon the facts of the case, guided by a sense of their solemn responsibility—which is to do their whole duty to the State as well as to the accused. *Ibid.*

30. A simple appearance is not sufficient to entitle a party to relief from a judgment forfeiting his recognizance. There must be an effective appearance—an appearance that finally disposes of the case. *The State* v. *Grice et al.*, 605.

31. If it is ever allowable for the accused to procure relief from such a judgment, it must at least be a case where he has done all in his power to procure a trial without effect. *Ibid.*

32. Where a person states, when examined on his *voir dire*, that he has formed and expressed an opinion relating to the guilt or innocence of the prisoner, and that it might bias him in forming an opinion after having heard the testimony—that direct evidence only would change his opinion—that circumstantial evidence would not—he should be rejected as incompetent to act as a juror, although he should further state that the opinion he has formed is not so fixed that it could not be changed by the evidence which might be adduced on the trial—that he thought he could do justice between the State and the prisoner—and that the opinion he had formed would not influence his mind as a juror. As to the appointment of triors, when there is a challenge to a juror, although such a request is unusual in this State, it should be allowed on the request of the prisoner. *The State* v. *Bunger*, 607.

33. The power to grant a change of venue is confided to the District Courts exclusively, and the exercise of it is not subject to revision by the Supreme Court. *Ibid.*

34. Where the accused is not called at the courthouse door to receive his sentence, nor his sureties called to produce his body, there is no forfeiture of the bond obligating him to appear and receive his sentence. *State* v. *Evans*, 626.

35. The statute against carrying concealed weapons does not contravene the second article of the amendments of the Constitution of the United States. *State* v. *Smith*, 683.

CRIMINAL LAW (*Continued.*)

36. A partial concealment of the weapon, which does not leave it in full open view, is a violation of the statute. *Ibid.*

37. An indictment which charges the selling liquor to a slave without the written consent of the master does not necessarily charge any offence by the Acts both of March 18, 1852, p. 225, and of March 15, 1855, p. 380. It is of the essence of the offence that the selling to the slave should be "without the consent in writing, of the owner, overseer or employer of such slave." Selling liquor to a slave, without the written consent of the owner, is no offence, if the slave has the written consent of the overseer or employer for the time being.
The State v. *Delerno*, 648.

38. Such a defect in an indictment is one of substance and not of form. The Statute of March 14, 1855, p. 171, to "regulate the mode of procedure in criminal prosecutions," did not debar the accused from moving to arrest the judgment for such a material omission in the indictment.
Ibid.

39. Section 17 of the same Act relates only to *formal* defects. *Ibid.*

40. The court, on a trial for murder, may rightfully reject as incompetent a juror who has conscientious scruples against finding an unqualified verdict of guilty in a capital case, even after he was accepted, both by the State and by the defendent, if he has not been sworn.
State v. *Reeves*, 685.

41. Where the whole of the regular panel of jurors has been exhausted, without securing a single juror, the prisoner has no right to require the service upon him, two days before the trial, of the list of the jury *de talibus* which is summoned. In such case the court may proceed with the trial *instanter*. *Ibid.*

42. The confessions of the accused, being entirely voluntary, made to the officers w ho went to arrest her, are admissable.
State v. *Adeline, a slave*, 736.

43. The jury found the prisoner guilty of manslaughter, and condemned her to the penitentiary for twenty-five years. *Held:* That there was no error in the period of time fixed for the imprisonment of the accused. The Act of 6th April, 1856, page 114, did not repeal the 7th section of the Act of 1843, page 92. *Ibid.*

See EVIDENCE—*Shea* v. *Wedemeyer*, 49.
See SUPREME COURT—*State* v. *Bass*, 478.
See SUPREME COURT—*State* v. *Kennedy*, 479.

DAMAGES.

1. The assessment of damages to the wife and children from the homicide of the husband and father, can only be the balancing of probabilities and chances. *Herrman* v. *Carrollton Railroad*, 5.

2. The Statute of March 1st, 1855, (Acts of 1855, p. 271,) having been passed since the Act complained of, can have no effect on this case. *Ibid.*

DAMAGES (*Continued.*)

3. Action of damages for non-performance of contract. Defendants agreed to convey plaintiffs from San Francisco to New Orleans, in about twenty-four days, connecting at San Juan, whence they were to be taken by the steamer Daniel Webster to New Orleans. The D. W. did not appear at San Juan for ten days after the arrival of plaintiffs. A violent storm at sea prevented the defendants from having a steamship at San Juan in time. *Held:* This was an inevitable accident and overpowering force, which exempted defendants from responsibility.

Van Horn v. *Templeton*, 52.

4. Any other steamship, equally fitted to transport passengers with comfort and safety as the D. W., would have been a compliance with the contract. *Ibid.*

5. Defendants contracted that the only extra expense of passengers would be for their board in crossing the Isthmus; and that on their arrival at San Juan they should immediately go on board the steamer. After their arrival at St. Juan they were not permitted to go on board the D. W. for about ten days. *Held:* That plaintiffs were entitled to recover their expenses for that length of time. *Ibid.*

6. Action for the value of a slave killed by the unskilfulness and fault of persons who were in the employment of defendant. The evidence showed that the defendant had contracted with the undertaker to put up the iron front on a building, and that afterwards defendant made a special contract with T. for T. to do the same work, with assistants and laborers employed and paid exclusively by T. The work fell to the ground and killed the slave. *Held:* That T. was not the servant or overseer of defendant, and consequently defendant was not liable.

Peyton v. *Richards*, 62.

7. A runaway slave, supposed to belong to defendant, was concealed in defendant's fodder house, among the fodder. Two slaves of defendant were sent to capture him. They thrust a broadsword into the fodder to frighten him out, and in so doing, inflicted a wound of which he died. *By the Court:* It was a grossly negligent and wanton act on the part of the defendant's slave to thrust a dangerous weapon like a broadsword into the fodder where they believed a fellow-slave was concealed. It matters not that they did not intend to kill him. The master is liable for the damage done by this inexcusable negligence and barbarity, to the extent of being compelled to pay for the slave killed or to abandon his own guilty slaves to the person injured.

Griffin v. *South*, 135.

8. Action against the proprietor of a newspaper for damages for a libel. In actions of this character malice is often implied. At common law, if the words spoken or published are themselves actionable, (as if they import an accusation of an indictable offence,) malicious intent is an inference of law, and therefore needs no proof. In this case malice does not mean a spite against the individual, but *malus animus*, a wanton disposition, grossly negligent of the rights of others.

Tresca v. *Maddox*, 206.

DAMAGES (*Continued.*)

9. The defendant had a right to report the fact that the plaintiff had been arrested and held for examination on a particular charge. But he had no right to go beyond this, and assume the guilt of the plaintiff upon an *ex parte* charge, heap accusations of other crimes upon his head without any foundation, and villify his character, except upon the responsibility of proving the truth of his accusations when sued for libel, and that they were made with good motives and for justifiable ends.

Ibid.

10. The fact that defendant recanted the charges against the plaintiff the day after they were made, was proper to be considered by the jury in estimating damages, but could not exonerate plaintiff entirely.

Ibid.

11. The satisfaction expressed by plaintiff at the apology and recantation made by the defendant was not a waiver of his claim for damages, as it was consistent with a reservation of his right to sue, if he thought proper. *Ibid.*

12. Although the libel was written by one of defendant's employees in the regular course of his employment, yet defendent was responsible, and though wholly without moral turpitude, yet damages could be recovered against him without special proof of the pecuniary amount actually suffered. *Ibid.*

13. Action to recover damages from defendant for alleged illegal conduct of the Board of Health, in ordering the ship to Fort Jackson, after her arrival in the city. *By the Court:* We think that the fault lies with with the captain of the ship in proceeding to the city without first having been visited by a health officer, and that he thereby took upon himself the risk of being compelled to return to Fort Jackson, particularly as the cholera had so recently shown itself on his ship, and there was a case of ship fever among the emigrants.

Rudolphe v. *New Orleans*, 242.

14. The doctrine that the city of New Orleans has a right to violate a contract, and redress is to be had only in damages against the city, is as unsound as it is novel. The violation of a contract may be, and very often is, the ground of an action sounding in damages against the party who has violated the contract. But the claim in such a case is for the reparation of a wrong, and the very opposite of a recognition of a right to violate a contract. *New Orleans* v. *Church of St. Louis*, 244.

15. The following charge to the Jury held to be strictly correct. In order to maintain an action for damages for a malicious arrest, the plaintiff must prove malice in fact, and that the arrest complained of was made, or procured to be made by the defendants from malicious motives, and without probable cause.

Gould v. *Gardner*, 289.

16. If it appears from the evidence, that the defendants in making or procuring the arrest, acted under the advice of counsel given in good faith; that they had a good cause of action against the defendant in said ac-

DAMAGES (*Continued.*)

tion, and a legal right to hold him to bail therefor—then the defendants are not liable in damages to plaintiff, and the action cannot be maintained against them. *Ibid.*

17. The verdict and judgment rendered in the District Court and confirmed in the Supreme Court, in the case of the present defendant *O'Connell & Gould*, in which the plaintiff was arrested and held to bail, and which arrest is the cause of action in this case, is conclusive evidence of a good cause of action in that suit, and cannot now be contradicted by parol or other evidence. *Ibid.*

18. The evidence of the existence of malice on the part of the defendants, in making the arrest of the plaintiff, is not sufficient to maintain this action, if there was a good or probable cause of action at the time, and an apparent legal right to hold to bail. *Ibid.*

19. In order to enable the plaintiff to recover in an action of damages against a railroad, it must appear that there was no want of care, and no imprudence on the part of the plaintiff, by which the injury was in any manner directly brought about, and that the injury was occasioned by the negligence of the company, or its officers, either in not having provided the necessary apparatus and fixtures to the locomotive or train by which the accident might have been guarded against, or by the carelessness or malfeasance of its agents. If it appear that the injury would have equally happened with or without such guards to the locomotive or train, then the want of them will not increase the responsibility of the company. *Hill* v. *Opelousas Railroad Co.*, 292.

20. In actions of this kind vindictive damages cannot be given, although the negligence is clearly proven. Vindictive damages are sometimes allowed in the case of wilful or malicious injuries. *Ibid.*

21. In estimating damages the jury may consider the painful nature of the wound, as well as the length of time the plaintiff may have been kept from his employment, and the permanent character of the injury. The jury should allow such reasonable sum as will compensate the plaintiff, and no more. The company in such cases is not to be punished for the negligence or carelessness of its agents as a crime. *Ibid.*

22. Where the object of the contract is anything but the payment of money, the damages due to the creditor for its breach, in the absence of any fraud or bad faith, are the amount of the loss he has sustained and the profits of which he has been deprived; and only for such damages as may reasonably be supposed to have entered into the contemplation of the parties at the time of the contract. Damages for supposed profits based on the speculative opinions of witnesses, are clearly inadmissible. *Gobet* v. *Municipality No. One*, 800.

23. It is well settled in the jurisprudence of Louisiana that where a collision occurs, if both parties, by their owm fault, contribute to the collision, the damages will not be apportioned as in admiralty, but neither party shall recover. But in determining the question of fault, we must look to the proximate and not to the remote cause of the injury. *Sackett* v. *McComb*, 325.

DAMAGES (*Continued.*)

24. An injunction issued to restrain the negotiation of a bill of exchange, which being dissolved, this suit for damages was brought on the injunction bond. *By the Court:* The rule of damages would seem to be that the probable loss sustained by a party in consequence of having been deprived of the free disposal of his own property should be the true standard; in other words, he should be placed as nearly as possible in the situation in which he would have been if the disturbance had not taken place. Consequential or vindictive damages cannot be allowed.
Gray v. *Lowe*, 391.

25. Plaintiff is entitled to recover lawyer's fees actually expended by him to obtain the dissolution of the injunction. *Ibid.*

26. Action of damages for a malicious arrest and imprisonment. Damages disallowed. *Lisk* v. *Mathis*, 418.

27. When the engineer of a steamer directed the manner in which certain repairs to the engine were to be made, in a matter in which his own knowledge was supposed to be superior to the persons employed by him, and directly against their opinion and advice, such person cannot be held liable for the imperfection of the repairs.
McCan v. *Steamer R. J Ward*, 427.

28. Where the plaintiff does not interfere with the officer charged with the execution of a final process upon a judgment regulary obtained, he cannot be held responsible for the wilful or negligent acts of such officer in the execution of the writ. *Mays* v. *Schmidt & Co.*, 478.

29. A person is responsible, under C. C., Art. 2294, for the damages resulting from an assault and battery committed by him.
Donnell v. *Sandford*, 645.

30. The future diminished capacity to earn wages, consequent upon injuries resulting from an assault and battery, properly enters into the computation of damages—also bodily pain and suffering occasioned by the battery may properly be considered by the jury in making up their verdict.
Ibid.

31. Damages will not be awarded against a plaintiff who has seized property belonging to a third party, under an execution against his debtor, where the plaintiff acts in good faith and has reasonable ground to suspect that such property is really the property of his debtor.
Phœbe v. *Vienne*, 688.

32. An action will not lie for damages resulting from a lawful act.
Donovan v. *New Orleans*, 711.

See LEVEE—*Dubose* v. *Levee Commissioners*, 165.
See SHERIFF—*Brand* v. *Wilkinson*, 278.
See DEFAULT—*Gobet* v. *Municipality No. One*, 300.
See LESSOR AND LESSEE—*Fitzgerald* v. *Ferguson*, 396.
See SALE—*Foulke* v. *Howes*, 448.

DEFAULT AND PUTTING IN DEFAULT.

1. Putting in default is a pre-requisite to the rescission of a real contract, but not to a simulated sale, which is not a real contract as to third persons injured thereby. *Lucas* v. *D'Armond*, 168.

DEFAULT AND PUTTING IN DEFAULT (*Continued.*)

4. Where the violation of a contract is passive, the putting in default is a prerequisite to the recovery of damages.

Gobet v. *Municipality No. One*, 300.

2. A violation is said to be passive, by not doing what was covenanted to be done, or not doing it at the time, or in the manner stipulated, or implied from the nature of the contract. *Ibid.*

3. It is a sufficient bar to an action for recovery of damages for the passive violation of a contract, that the defendant was not put in default by the plaintiff previous to the expiration of the time within which the plaintiff stipulated to perform his part of the contract. *Ibid.*

5. Plaintiffs sued for the specific performance of a contract, by which defendant agreed to buy of him certain land *free from incumbrances: Held*, that plaintiff, in order to maintain his action, should have done all required of him by law to put the defendant *in mora*; C. C. 1907, 1908. Besides executing an act of sale of the land to defendant he should have procured the receipt of the Tax Collector and the certificate of the Recorder of Mortgages, showing that the property was free from incumbrance.

Faisans v. *Moore*, 741.

DONATION.

See Wills and Testaments.

DEPOSIT.

See Principal and Agent—*Beatty* v. *McLoed*, 76.

DONATIONS *INTER VIVOS.*

1. That defendant's ancestor once lived in a state of concubinage with the plaintiff will not defeat an action brought by the latter against the former to carry out an act of donation, *inter vivos*, made by defendant's ancestor to plaintiff, "of movables not exceeding one-tenth part of the whole value of his estate." C. C., 1468. *Bush* v. *Decuir*, 503.

ELECTION.

1. There is no law which makes an election day a *dies non juridicus.*

Anderson v. *Folger*, 269.

EMANCIPATION.

See Slaves and Slavery.

ESTOPPEL.

1. The objection that no legal notice of seizure was given cannot be urged by a party who appointed an appraiser, and was present at the sale.

Bermudez v. *Union Bank*, 64.

2. A written admission made by plaintiff, that a certain slave is the property of F. D., and that "he can do as he pleases with her," estops her from claiming the slave from one to whom F. D. had made title.

Webb v. *Deeson*, 84.

3. However informal the act of a family meeting may be, parties to it, who are *sui juris* at the time, as well as their assignees, are bound by their declaration therein, and estopped to deny the title of a person in whom the act declared it to exist. *Lejeune* v. *Barrow*, 501.

ESTOPPEL (*Continued.*)

4. A defendant, in an action for the partition of community property, who demands in reconvention a judgment for one-half of the charges incurred in supporting the slaves in controversy, will be precluded from asserting title to plaintiffs' interest in the property, as a "*dation en paiement*" *Dorvin* v. *Wiltz*, 514.

5. In a possessory action, where plaintiff alleged himself to be the owner and possessor of the land in question—*Held:* That the defendant having, in answer to interrogatories propounded to him, admitted that he leased the land from the plaintiff, defendant was estopped to deny the allegation of ownership and possession. *Williams* v. *Douglas*, 632.

6. The fact that a party gave his promissory note for the balance due, as set forth in an account, does not operate as an estoppel to a subsequent inquiry into the correctness of the account. Such a doctrine would abolish all equitable defences upon promissory notes or upon accounts stated. *Waters* v. *Briscoe*, 639.

See PRINCIPAL AND SURETY—*Borgeat* v. *Adams*, 78.
See CONTRACT—*Woodworth* v. *Wilson*, 402.

EVIDENCE.

1. All that a prisoner says on the subject matter at the time of making a confession is admissible; but the jury is at liberty to believe one part of the confession and disbelieve another. *State* v. *Wedemeyer*, 49.

2. In a prosecution for selling or giving spirituous liquor to a slave, the onus is upon the accused to show that such liquor was sold or given with the consent of the owner or person having charge of such slave. *Ibid.*

3. An act under private signature has no date against third persons; but a date may be given to such an instrument by evidence *dehors* the instrument itself. *Hubnall* v. *Watt*, 57.

4. The endorsement of the payee must be considered as proved when the note is offered in evidence, without objection, as the endorsement then constitutes a part of the instrument declared upon. *Blanque* v. *Woods*, 103.

5. Where plaintiffs allege that the defendants, and those under whom they claim, hold illegal possession, defendants' titles are admissible to rebut the allegation of illegal possession. *Kellar* v. *Parish*, 111.

6. Defendants' titles are also admissible to prove prescription when pleaded by the original defendants, and which their warrantors were authorized and interested to maintain. *Ibid.*

7. It is not competent for a party, against whom one of his letters is offered in evidence, to show by the parol evidence of the witness who wrote the letter for him that he "intended" something different from what the letter expresses. *Williams* v. *Hood*, 113.

8. A transcript of a later date than the one sued on, containing copies of writs and returns, &c.—which had been omitted by mistake in the first transcript—was properly received in evidence. *Davis* v. *Dugas*, 118.

9. The certificate of the Recorder was properly received in evidence. He was the obligor in the act of mortgage, and of course knew his own signature. Code, 3331. *Haines* v. *Verret*, 122.

EVIDENCE (*Continued.*)

10. When the cross interrogatories are not answered, the depositions should not be received in evidence. *Le Baron* v. *Dupont*, 140.

11. It is for the jury, and not the witness, to determine from all the circumstances disclosed whether the plaintiff occasioned any damage to defendant by his negligence, or want of skill, and if so, to assess the amount of such damage. Hence, the testimony of the witness as to his opinion of the amount of damage suffered is not admissible.
Wilcox v. *Leake*, 178.

12. Appeal from an order of seizure and sale, on the ground that the mortgage notes contained a condition that could not be judicially assumed as having happened. The mortgage notes contained the following clause: "And in case of an overflow of the river, the payment to be extended one year longer, by paying interest." *By the Court:* This clause cannot be considered as containing a suspensive condition. It is clear that the defendant's obligation did not depend upon a future, or uncertain event; on the contrary, its terms were express. Code, 2015, 2016, 2038. The object of this clause, it is in evidence, was to secure to the defendant, in the event of an overflow, the right to prolong the term of his obligation. In order to exercise that right, the burden was on him to show that the event had happened at the time the order of seizure and sale was sued out. *Marsh* v. *Foster*, 181.

13. Where a bill of sale of slaves is dated in this State, a party will not be permitted to show that the sale was made in another State, in order to ingraft on it the laws of that State. *McCall* v. *Henderson*, 209.

14. A memorandum book, kept wholly in the handwriting of the deceased, is admissible in evidence to show his indebtedness to a surviving partner.
Succession of Cousteaud, 216.

15. Acknowledgments of the receipt of money by the husband from the wife are not evidence against third persons not parties to them, and the judgment rendered against the husband in favor of the wife can have no more effect against third persons than the acknowledgments themselves.
Dunn v. *Woodward*, 265.

16. The fifth section of the Act of 1855, "relative to evidence," does not empower the courts of this State to take judicial notice of the statutes of other States. It provides, "that the published statutes and digests of other States, shall be *received* in the courts of this State as *prima facie* evidence of the statute laws of the States from which they purport to emanate." *Anderson* v. *Folger*, 269.

17. Action for damages for injury done plaintiff by being thrown from the cars. A bill of exceptions was taken to the admission in evidence of the declarations of the Superintendent as to the conduct of the engineer. *By the Court:* It is clear that the Board of Directors alone had the power to make admissions in regard to the controversy which would bind the company, and that no ordinary agent of the company would possess the power unless expressly granted.
Hill v. *Opelousas R. R.*, 292.

EVIDENCE (*Continued.*)

18. The flatboat of the plaintiffs being lawfully moored where she was [illegible], the burden of proof is on the defendants to show that the accident could not have been avoided. *Sackett* v. *McComb*, 335.

19. Parol proof is inadmissible to prove a *dation en paiement*, or an exchange of slaves by an administrator. *Laycock* v. *Davidson*, 328.

20. Parol evidence is inadmissible to explain a patent ambiguity in a marriage contract. *Stratton* v. *Rogers*, 380.

21. The licitation of property to effect a partition may be ordered, on proof by witness of its necessity, as well as upon the report of experts. *Florance* v. *Hills*, 388.

22. It is incompetent for a maker of a promissory note, secured by authentic act of mortgage, in which the note is said to be given for money borrowed of payee—to prove by parol, especially against a third person, not a party to the mortgage—that the payee had acknowledged that no consideration had passed for the note. *Douatt* v. *Louge*, 399.

23. A mulatto having been examined in chief as a witness for the State—on cross-examination it appeared that he had been a slave, whereupon the prisoner's counsel called on the court to exclude his testimony, there being no evidence that he had been emancipated. *Held:* the objection came too late—there being no averment that the incompetency of the witness was not known before the examination in chief. The color of the witness would naturally have suggested an inquiry into his condition on his *voir dire;* and as the prisoner had a person in court to prove that the witness had once been a slave, there could have been no surprise when, on the cross-examination, the witness testified to that fact. The prisoner could not be permitted thus to take the chances of the witness' testimony if it had been favorable to him, reserving the right to object to his testimony if unfavorable. *State* v. *Taylor*, 430.

24. Where the objection to the competency of the witness arises from his *own examination*, he may be further interrogated to facts tending to remove the objection, though the testimony might, on other grounds, be inadmissible. When the whole ground of the objection comes from himself only, what he says must be taken together, as he says it. *Ibid.*

25. Under an allegation made by the plaintiff, who sought to enjoin the sale of property seized by defendant, that plaintiff was the owner of the property seized, he cannot be permitted to prove the extinguishment of the mortgage note held by defendant. *Patterson* v. *Tompkins*, 452.

26. After the testimony had been taken, and the argument commenced, the cause was continued. Pending the continuance a new judge was elected, who refused to try the case *de novo*, but permitted counsel to take bills of exceptions to the testimony which had previously been introduced. *Held:* The plaintiff had the right to have the cause tried *de novo*, but as he was not prejudiced by the action of the court, inasmuch as his bill of exceptions shows that his sole purpose in asking for a trial *de novo*, was to allow him to except to certain evidence, which the court permitted, there is, therefore, no error in the proceedings of the inferior court. *Ealer* v. *Freret*, 455.

EVIDENCE (*Continued.*)

27. Parol evidence is admissible to show fraud in the registry of title to a steamboat. *Ibid.*

28. Parol evidence is admissible to prove the manual gift of movables. *Maillot* v. *Wesley*, 467.

29. As our laws do not permit either replication or rejoinder, all matters of defence set up in the answer must therefore be considered as open to every objection of law and fact, as if such objections had been specially pleaded. So, where plaintiffs claim certain furniture as belonging to the succession, and defendant answers that the furniture was a donation to her from the deceased, it is competent for the plaintiff to prove that defendant was the concubine of the deceased, so as to reduce the donation if it exceeded one-tenth of the estate. *Ibid.*

30. Where neither the plaintiff nor defendant sought to avail himself of the report of experts in the manner provided by Article 456 of the C. P., the plaintiff had the right to disregard altogether the report, and prove up his claim. *McCarty* v. *Zacharie*, 474.

31. Where counsel for a married woman admitted in his brief that the person who filed an answer on her behalf, was her accredited agent, "with the full authorization and consent of her husband," the court will presume that the proceedings against the wife were fully authorized by the husband. *Bach* v. *Lakin*, 489.

32. The testimony of witnesses as to identity of a slave, when the slave is before them, preferable to that of witnesses who describe him from memory only, though the presumption be strong that the latter testify as to the same negro. *Brack* v. *Wood*, 512.

33. Parol evidence of plaintiff's admission that he promised to abandon the slaves in question to the defendant, although received without opposition, will not have the effect to entitle defendant to assert such title. *Dorvin* v. *Wiltz*, 514.

34. The Supreme Court will give effect to evidence which would have been inadmissible under the pleadings, but to which no objection was made. BUCHANAN, J., dissenting. *Ibid.*

35. A verbal quit claim of slaves, amounting to an informal settlement of a community, will avail as a *dation en paiement*, notwithstanding it was not reduced to writing. BUCHANAN, J. dissenting. *Ibid.*

36. A duly certified copy of an act under private signature, recorded in the office of conveyances, is admissible in evidence, in lieu of the original, when the latter is lost, and due diligence has been used in searching for it and publishing the loss. *Boykin* v. *Wright*, 531.

37. The fee dockets of clerks of courts are official records authorized by Art. 776 of the Code of Practice, and copies from them, duly certified, are admissible in evidence. The fact of their serving as account books for the fees of the clerk, does not lessen their authenticity as records of the proceedings had in suits. *Ibid.*

EVIDENCE (*Continued.*)

38. In an action of revendication for a slave, the parol declarations of defendant in regard to plaintiff's title, are inadmissible. The plaintiff cannot recover by the weakness of defendant's title—it must be by the strength of his own. *McMaster* v. *Stewart*, 546.

39. The answer of one of the defendants, who are commercial partners, is admissible against his co-defendant. *Allen* v. *May & Kohn*, 627.

40. The nature and extent of the service of counsel may be proved by parol. *Brewer, executor*, v. *Cook*, 637.

41. The defendant was entitled to the production of plaintiff's accounts, or such of them as, in his opinion, might tend to establish his defence, subject to the plaintiff's right to introduce all of his accounts having any bearing upon the matters in issue. *Waters* v. *Briscoe*, 639.

42. A party will not be allowed, collaterally, to vary or complete a record by parol evidence, but when the ground of action was solely to obtain a remedy for an injury suffered by plaintiff through a clerical omission of an important entry connected with and indispensible to a certain legal proceeding, namely, the omission to enter the order of appeal, and when the plaintiff had laid the foundation for the introduction of proof of the omission, by the production of the bond of appeal and the transcript made for the review of the proceedings in the Supreme Court. Under these peculiar circumstances, parol proof, by the custodian of the record, of the omission to enter the order of appeal, should have been allowed. *Temple* v. *Marshall*, 641.

43. The statement by an administrator that "he could not pay a certain claim until he had rendered his tableau," is not a sufficient acknowledgment of debt to bind the estate. *Figuras v. Benoist*, 688.

44. Although the witnesses are neither nurses nor physicians, they are competent to prove the value of services rendered by a nurse. *Ibid.*

45. The answers of two witnesses to interrogatories propounded to them, were written down by the commissioner as one deposition, which was signed by both witnesses—*Held:* That the whole of the answers must be taken as testimony given by both the witnesses. *May* v. *Norton*, 714.

See WITNESS.
See WILLS—*Succession of Betsy Young*, 65.
Succession of Clark, 124.
See OFFICE AND OFFICERS—*Rudolphe* v. *Board of Health*, 242.
See PARTNERSHIP—*Pratt* v. *McHatton*, 260.
See PRIVILEGES—*Antognini* v. *Bailey*, 275.
See DAMAGES—*Gould* v. *Gardner*, 289.
See COMMON CARRIER—*Humphreys* v. *Switzer*, 320.
See SALE—*Fellows* v. *Carson*, 121.
Webb v. *Coons*, 252.
Foulks v. *Howes*, 448.
See ATTORNEYS—*Perkins* v. *Douglass*, 471.
See CRIMINAL LAW—*State* v. *Bass*, 478.
See HUSBAND AND WIFE—*Crane* v. *Allen*, 498.
See PRINCIPAL AND AGENT—*Bush* v. *Decuir*, 508.
See CRIMINAL LAW—*State* v. *Bunger*, 607.
See HUSBAND AND WIFE—*Tulley* v. *Alexander*, 628.
Succession of Peyran, 694.
See CRIMINAL LAW—*State* v. *Adeline*, 736.

EXECUTION.

1. Appeal from a judgment overruling a motion to quash an execution, on the ground that the execution issued on the judgment, instead of the twelve months' bond given by defendant at a sale of his property, bought by him under a previous execution on the same judgment. *By the Court:* Wherein does it concern defendant whether the present *fi. fa.* issued upon the judgment or the bond? He is the principal debtor in both, and he does not pretend by his pleadings that he has ever paid the debt, or that it has been extinguished in any mode known to the law or that he has any possible defence to it. *Trescott* v. *Lewis*, 184.

2. A twelve months' bond taken under execution upon a judgment does not operate a satisfaction or novation of the judgment. *Ibid.*

3. The Act of March 14th 1852, p. 82, concerning the licensing of drinking houses, does not confer the power of seizing property by summary process to secure the payment of a license when granted.
Hall v. *Corporation of Bastrop*, 603.

4. If a person has obtained such a license, without paying for it, the remedy to enforce payment, is by ordinary action. *Ibid.*

See USUFRUCT—*Davis* v. *Carroll*, 705.

EXECUTORS AND ADMINISTRATORS.

1. It is well settled that payments by an executor, without an order of court are irregular, and not binding, unless it be shown that they liberate the estate from a legal obligation. *Beatty* v. *Dufief*, 74.

2. In a suit on a bill of exchange by an administrator, the defendant will not be permitted to attack the legality of the appointment of the administrator. *Williams* v. *Hood*, 113.

3. An administrator has no capacity to appeal in behalf of parties whom he has placed on his account as creditors, and whose claims have been opposed and rejected by the court. *Succession of Pettis*, 177.

4. To consider the acknowledgment by an administrator of a claim against the estate as conclusive of its correctness, notwithstanding an opposition specially made to that item of the account, and without further proof, would be virtually to abrogate Articles 1004, 1005 and 1006 of the Code of Practice. *Ibid.*

5. Executors, administrators, curators and syndics, are bound to keep a bank book in their official names, and deposit all moneys collected by them, as soon as received, in a chartered bank, if there be one in the parish, although no chartered bank of the State pays interest on deposits.
Succession of Pasquier, 279.

6. In a compromise partition of the effects of the succession between the widow and heirs in 1850, the ship C. fell to the heirs. The executor, however, was not discharged. In 1851 the ship was in Liverpool, where she was supplied by plaintiff with patent metal for sheathing, for the price of which this suit was brought. The ship seems to have been sent on this voyage by B. & C., B. being the executor. *By the Court:*

EXECUTORS AND ADMINISTRATORS (*Continued.*)

Under the circumstances of this case, the executor, in that capacity, cannot be rendered responsible for this bill. The plaintiff must be left to his remedy against B. & C. and the heirs who authorized this voyage. The executor, as such, can only be rendered responsible for expenses incurred in the legitimate administration of the succession.

Munts v. *Succession of Broom*, 472.

7. It is unjust that the owners should be benefited to the extent of the labor and materials furnished by the plaintiff, without any liability for a reasonable remuneration. LEA, J., with whom concurred SPOFFORD, J., dissenting. *Ibid.*

See PRINCIPAL AND SURETY—*Borgeat* v. *Adams*, 78.
See CONTRACT—*Woodworth* v. *Wilson*, 402.

EXPROPRIATION OF PROPERTY.

1. Although the parish had no title to the site for the court-house reported by the commissioners, they could have acquired title by a forced expropriation upon a previous indemnity to the owners. Code, 2604 *et seq.*

Watts v. *Carroll parish*, 141.

FACTOR.

1. A planter shipped his cotton to defendants, merchants in New Orleans. He afterwards wrote to them to sell by the time his brother returned from Texas, a period fixed by a conversation had with him. Cotton was then worth 12½ cents. They did not sell for several months afterwards, when cotton fell to 7 cents. *Held:* That the letter was a positive instruction to sell, and that they were liable for the difference in the price. C. C. 2971, 2972. *Magoffin* v. *Cowan*, 554.
2. The fact that he shipped a subsequent crop to the defendants was no ratification of their acts in the premises. *Ibid.*

FACTS.

1. Facts constituting bad faith in a purchaser or possessor.

Mathis v. *Gerants*, 3.

2. Facts warranting an abandonment of a voyage by a steamboat on the Mississippi, and the recovery of freight thereupon, on a policy of insurance. *Roe* v. *Crescent Insurance Co.*, 406.
3. Question of fact as to whether the damage to goods was before or after shipment. *Whitney & Co.* v. *Gauche*, 432.
4. An act of sale declared not to have effect as such, because there was no real price. *Hill* v. *Maddox*, 511.
5. Facts, under which acts of agent were held to bind principal.

Person v. *Rutherford*, 537.

FAMILY MEETING.

1. Where a family meeting assented to the second marriage of the tutrix, on condition of her giving bond to secure the minors, it will be time enough to consider the effect of this condition after the second marriage is contracted. *Succession of Landry*, 85.
2. A mere informality in the organization of a family meeting, does not involve a nullity of its proceedings, and they will not be set aside in the absence of proof of injury to the minors. *Ibid.*

FAMILY MEETING (*Continued.*)

2. A mortgage on the property of a minor was attacked on the ground that the under tutor was not called to the family meeting which consented to the mortgage. The following acknowledgment, signed by the under tutor, witnesses and notary, was written at the foot of the *proces verbal* of the family meeting, to wit: "And S. N., the under tutor of said minor children, having waived due notice to attend, and having taken full cognizance of the foregoing proceedings, declared that he approved the same in every respect." *Held:* That it cannot reasonably be inferred from this acknowledgment that the under tutor was absent from said family meeting. The law makes it the duty of the under tutor to oppose the homologation of the family meeting when he is of opinion that it is injurious to the interest of the minors. Its requirements to attain the object were substantially complied with.

Judson v. *Hertz*, 715.

FEES.

1. Where witnesses differ as to the charges made by physicians, the correct rule is to allow the lowest estimate. *Succession of Duclos*, 406.

GARNISHEE.

1. Answers by garnishees, which are manifestly evasive, ought not to be amended; such practice might lead to frivolous delays. But where an answer is really responsive to the question, though it might be more comprehensive, it is within the discretion of the court to allow the garnishee to answer more fully, in cases where the questions propounded admit of a truthful but, at the same time, of an unsatisfactory answer.

Davis v. *Oakford*, 379.

HARBOR MASTER.

1. There is nothing in the Act of 8th of March, 1841, creating the office of Harbor Master, which justifies the conclusion that the 8th of March was the day fixed by law for the commencement of the term of office of Harbor Master. *Ivy* v. *Lusk*, 486.

HEIR.

1. The children and grandchildren of a natural aunt of the deceased are not entitled to the estate—there being no statute authorizing them to set up such an illegitimate relationship as a basis for the right of inheritance, which is the creature of positive law. Code, 911, 915, 917, 923.

Fletcher et al. v. *Decoudreau*, 59.

2. Natural children are not like legitimate heirs seized of the succession at the instant the ancestor dies. They have only a right of action to cause themselves to be put in possession upon a proper showing. Code 919, 943. *Ibid.*

3. The State claimed the succession, charging that M. L. was an adulterous bastard; to the evidence of which she objected, under Article 968 of the Code, which provides that "the exclusion [from the inheritance,] either for cause of incapacity or unworthiness, shall not be sued for others than the relations who are called to the succession of the unworthy heir," &c. *Held:* The State is not suing to exclude M. L. under

HEIR (*Continued.*)

any of the pretences contemplated in Article 368. She is an actor seeking by proof to have herself recognized heir. She must, therefore, make out her case like other plaintiffs, and, when apparently made out, it is open to be rebutted. *Ibid.*

4. If the act upon which she bases her claim to the heirship be a nullity, she cannot be put in possession of the estate; and the act is a nullity if made in contravention of Article 222 of the Code, which prohibits the acknowledgment of children the offspring of an adulterous or incestous intercourse. *Ibid.*

5. This prohibition would be futile if the State could not insist on the inquiry whether the acknowledged child was an incestous or adulterous bastard—for such a bastard can only exclude the State. C. C. 477, 1184, 1185, 1186, 1202, 1203. *Ibid.*

see SIMULATION—*Dupuy* v. *Dupont*, 225.

HOMESTEAD LAW.

1. Mrs. B. claimed a thousand dollars out of her deceased husband's estate, under the "Act to provide a homestead for the widow and children of deceased persons"—against *bona fide* mortgagees. In answer to interrogatories, the widow said that she owned a house worth seven hundred dollars, and added a vague statement that she was in debt. *By the Court:* The statute does not say that the amount of property owned by her must be estimated over and above her indebtedness, whatever it may be and whenever due, and we cannot add such a provision to it. Three hundred dollars allowed. *Duchamp* v. *Butterly*, 67.

2. Creditors of the succession of a deceased husband cannot question the constitutionality of the Act of 1852, to provide a homestead for widows, on the ground that it violates a marriage contract made prior to the passage of the Act. *Succession of Aaron*, 671.

3. Where the claim of a widow under the homestead Act is set up by way of opposition to a tableau of distribution, the administrator only offers evidence to show that she has appropriated property to her own use, belonging to the succession of her husband, or only offers any other defence tending to reduce her claim. *Succession of Balzaretti*, 674.

HUSBAND AND WIFE.

1. By the laws of Pennsylvania and Maryland, if the husband has not, during his life, reduced to possession the choses in action of his wife, they will pass to her representatives. *Bone* v. *Sparrow*, 185.

2. *By the Court:* In a case similar to this we have held that the laws of Louisiana must control the distribution of the residuary interest of a succession in this State—the right of action for the recovery of the same being immovable from the object to which it applies. *Ibid.*

3. The meaning of Article 1738 of the Code is this: if the donor has made a donation to his wife simply of future property, and he survives her, the donation will fail, although there was issue of the marriage. *Stratton* v. *Rogers*, 380.

HUSBAND AND WIFE (*Continued.*)

6. Construction of a marriage contract. *Ibid.*

5. Though recognizing the decisions of common law courts, that where a father sends home slaves with his married daughter, it is presumed to be a gift—yet it is settled in Mississippi, that the character of the wife's possession of such property may be shown by her acts and declarations, out of the presence of her husband. *Crane* v. *Allen*, 493.

6. When a judgment of separation from bed and board is rendered, the husband ceases to be the head of the community, and one undivided half of the property thereof vests immediately in each of the spouses, who thereby become joint owners; the wife having in this case continued to possess *nomine communi*, is accountable for the fruits of the property. *Dorvin* v. *Wiltz*, 314. 514

7. A married woman on proof of the insolvent condition of her husband, and on proof also that she has skill and industry to earn a separate livelihood, has a right to a separation of property, whether at the time of marriage she had or had not property. *Mock* v. *Kennedy*, 525.

8. See 10 A. R. for decision remanding this case. In Mississippi (as is admitted,) a settlement, *bona fide*, made before and in contemplation of marriage, is good not only against the husband but against his creditors and subsequent purchasers. This rule is yet more inflexible, where, in anticipation of marriage, the wife has secured her own property to her own use and that of her children. *Spears* v. *Shropshire*, 559.

9. Even though, before the marriage settlement, the parties had been formally espoused, the husband having then a wife living (in Tennessee,) which espousals were by the law of Mississippi *void;* yet a divorce having taken place between the husband and his first wife, and a second marriage, after such divorce, formally celebrated in Mississippi, between the husband and his second wife, in view of which this marriage contract was executed, the contract is as valid as if the first illegal marriage had never existed, as against subsequent creditors. *Ibid.*

10. The contract must be governed by the law of Mississippi, where the parties resided at the time of the marriage. C. C. Art. 10. *Ibid.*

11. Where the husband and wife by their marriage contract, executed in France, stipulated: 1st. That they adopted, as the law of their marriage, the dotal system, (*régime dotal,*) to the exclusion of that of the community, (*régime en communauté,*) and 2d, that the acquisitory (*acquets*) made during the marriage should be shared equally by the spouses, and should revert to the children of the marriage, each of the contracting parties, in default of such children, to have the free disposition of his or her moiety. It was held that this contract created under the French law a modified or limited community (*communauté conventionelle*) between the spouses—and that all acquisitions made after the marriage, except such as were made by inheritance or donation to one of the spouses, belonged to this community. *Rochereau et al.* v. *Jonau et al.* 598.

HUSBAND AND WIFE (*Continued.*)

12 *Held*, consequently, that the husband and wife having removed to Louisiana after the marriage, immovable property acquired here in the name of the latter was not the separate property of the wife but formed a portion of the community, and the husband having become insolvent and having made a surrender of his property to his creditors, the title of the immovable so acquired, vested, by force of the surrender, in them. *Ibid.*

13. *Held*, also, under this contract, the wife could not acquire a separate estate in her own name until the community was dissolved by the decree of a competent tribunal, unless the acquisition was made by a re-investment of her paraphernal capital. *Ibid.*

14. The rule that the husband cannot be a witness for or against his wife, nor the wife for or against her husband, C. C., 2260, being founded on considerations of policy and morality, is believed to be without exception, and the fact that the spouses live apart does not change this rule of law. *Tully* v. *Alexander*, *Ex.*, 628.

15. The decree of separation from bed and board does not dissolve the bonds of matrimony. C. C. Art. 133; C. C. Art. 152.

Gee v. *Thompson*, 657.

16. The surviving wife is not precluded from claiming the marital portion, under Art. 2359 C. C., by the fact of having obtained a judgment of separation from bed and board, and of having lived separate from her deceased spouse up to the time of his death, for though separated in bed and board, she is still the wife, and incapable of contracting a second marriage. *Ibid.*

17. When the husband died worth $31,000, and the surviving wife was fifty-five years of age, and all the means she had was $1,180, *Held:* that the husband died rich, and the surviving wife was in necessitous circumstances within the meaning of Art. 2359 of the Code. *Ibid.*

18. The Art. 918 C. C., which provides the heir to the entire succession, does not repeal nor introduce an exception into Art. 2359, which provides for the sole case where one of the spouses dies rich, leaving the other in necessitous circumstances. *Ibid.*

19. The husband or wife, separated in bed and board, is not entitled to the marital portion. LEA, J. dissenting. *Ibid.*

20. A married woman, cited as garnishee, must answer the interrogatories propounded, though she be not authorized by the court or her husband, under penalty of having them taken *pro confesso*.

Henry v. *Bryce*, 691.

21. Although it may be true, that when creditors of the husband attack a judgment of separation, it is incumbent on them to allege and prove that they were creditors at the time of its rendition, and further, that it was obtained by fraud and collusion in order to defeat their recourse on the husband's property, *yet* this must be held to apply to a case where the judgment is ostensibly valid, and not to a case which does not appear to have dissolved the community.

Levistones v. *Brady*, 696.

HUSBAND AND WIFE (*Continued.*)

22. The judgment offered in evidence was "that M. de M., wife of L., have judgment against her said husband, decreeing a separation of property between her and her said husband, and granting to her the administration of her private and individual property," &c. No other part of the record of said suit was before the court. *Held:* that the judgment, as it reads, creates a strong presumption that it was a consent judgment—a voluntary separation of property which did not dissolve the community. C. C. 2401, and besides, there being no publication, as required by Arts. 2402 and 2403 C. C., that the creditors of the husband were justified in making a seizure of property apparently belonging to it.

Ibid.

See COMMUNITY.
See PLEADING—*Coxand* v. *Pulley* 1.
See SHERIFF—*State* v. *Cooley*, 79.
See MORTGAGE—*Ashford* v. *Tibbitts*, 167.
See PRACTICE—*Dunn* v. *Woodward*, 265.
See EVIDENCE— —— —— 265.

IMPROVEMENTS.

1. To entitle plaintiff to payment for fruits and revenues accruing before the institution of a suit, it must be shown that defendant possessed in bad faith *Lejeune* v. *Barrow*, 501.

2. As to value of improvements, the judgment of the District Judge will not be disturbed unless there be manifest error. *Ibid.*

INJUNCTION.

1. The destruction of forest and and other trees is an irreparable injury from which parties may be restrained by injunction, and such injunction cannot be set aside *ex parte* under Article 307 of the Code of Practice.

De la Croix v. *Villere*, 39.

2. Plaintiff proceeded *via executiva* on a supposed authentic act of mortgage, and procured an order of seizure and sale of the land sold by him to defendant, who had neglected to pay a balance of the price. Defendant sued out an injunction on the grounds: 1. That the act was not authentic; 2. That the fees and costs of copies were exorbitant; 3. That he was in danger of eviction. Plaintiff answered the petition in injunction, admitted that the act was not authentic, and converting his proceedings into the *via ordinaria*, prayed for judgment against the plaintiff in injunction. *By the Court:* The effect of this answer was to reinstate the parties in their original position as plaintiff and defendant in an ordinary suit. The injunction had fulfilled its office, and the order of seizure and sale was at an end; the petition in injunction stood as the answer to the original petition for executory process, now converted into a petition for a judgment personal against the defendant, with a recognition of a mortgage on the land. *Haines* v. *Verret*, 122.

3. The petition in injunction contained a prayer for a trial by jury, which the District Court refused to allow. *Held:* the court did not err. The obligation to pay the plaintiff the price of the land was unconditional, and there was no affidavit denying defendant's signature, or averring that it had been obtained through fraud or error, or of want or failure of consideration. *Ibid.*

INJUNCTION (*Continued*).

4. In an injunction suit, where the issues have once been properly presented to the court upon pleadings involving issues upon the merits, a judgment dissolving the injunction, unless appealed from, will be conclusive between the parties, where the same grounds are again set up to enjoin a second seizure for the same debt, or of the same property.

Mock v. *Garthwaite*, 287.

5. In an injunction suit, where there is judgment of non-suit on the plaintiff's being called and not appearing, the injunction bond is forfeited.

Whitehead v. *Tulane*, 302.

6. Matters available in defense of a suit, will not authorize an injunction, at least in the absence of any showing, that an irreparable injury is about to be inflicted. *Taylor* v. *Clark*, 560.

7. If the Sheriff has seized more property than could be considered reasonably necessary to satisfy the judgment, the proper course is not an injunction but an application to the District Judge to reduce the seizure. C. P. 611. Where it appears that plaintiff, in injunction, was not only surety on a twelve month's bond, but co-debtor, *in solido*, with the principal in the judgment on which the execution had issued, and that the property had been sold, for which the twelve month's bond was given, and also that the bond was past due and unpaid—the defendants had the right to issue execution against him in his capacity of surety. C. P. 719, 720.

Temple v. *Marshall*, 613.

INTEREST.

1. The depositary owes no interest for the money deposited, except from the day on which he became a defaulter by delaying to restore it.

Faucette v. *New Orleans*, 199.

2. Interest is due by a depositary only from the demand for restitution.

Fogle v. *Delmas*, 200.

3. Suit upon a factor's account. Where the defendant had never acquiesced in the account as rendered, and there was no contract for interest, the plaintiffs can only recover legal interest. *Brander* v. *Lum*, 217.

4. Any device, by which a larger amount is sought to be obtained, for the use of money, than the highest rate of conventional interest, is usurious and operates as a forfeiture of the advantage thereby sought to be illegally obtained. *Anderson* v. *Coxe*, 638.

5. The Act of 1852, allowing interest at the rate of five per cent. per annum, upon all debts from the time they become due, is applicable only in cases where no stipulation for interest has been made. *Ibid.*

INSOLVENCY AND INSOLVENT PROCEEDINGS.

1. Cases might arise in which a provisional syndic would not only be authorized, but required to institute suits, or defend them. The expense of counsel fees in such would be chargeable to the mass surrendered to the creditors. *Mathews & Finley* v. *Their Creditors*, 36.

2. The opposition to a voluntary surrender, under the 18th section of the Act approved February 20th, 1817, must be made within ten days. The 10th

INSOLVENCY AND INSOLVENT PROCEEDINGS (*Continued.*)

section of the Act of 1840, which allows one year for proceedings under it, has no application to cases of voluntary surrender. *Ibid.*

3. No opposition can be filed, under the 18th section of the Act of 1817 after the lapse of ten days, though the creditor did not know of the fraud complained of within that time. *Ibid.*

4. In May, 1850, C. deposited certain shares of bank stock with S., as collateral security for the payment of $10,000 due S. On the 10th of June, 1851, C. executed a power of attorney to S., authorizing him to "sell, transfer, and assign unto himself, or any other person or persons," the shares of bank stock. On the 29th of August following, under this power, an actual transfer of the stock was made to S. In the mean time say about the 1st of July, 1851, C. came under protest—and, on the 7th of November of the same year, made a cession of his property. His syndic, the plaintiff, instituted this suit, alleging that C. was in insolvent circumstances on the 10th of June, 1851, as well as on 29th of August, and to the knowledge of defendant. He prays that the transfer be set aside, and that the stock be decreed to belong to him in his capacity as syndic. *Brother* v. *Saul*, 223.

5. *By the Court:* We have here a pledge of the stock made in good faith, to secure a *bona fide* debt, at a time not suspicious, and by which no creditor was injured. The allegation of the petition, that *Conrey* was insolvent on the 10th of June, 1851, and that to the knowledge of *Saul*, is disproved by the evidence, and even by the admission of the plaintiff. Simultaneously with the pledge of the stock, the power of attorney was given, purporting to be *for value received* and *irrevocable*. Those clauses sufficiently indicate the interest of *Saul* in the object of the mandate—the stock. That interest was an interest of pledgee. As pledgee he has no power to sell the object pledged, unless by virtue of a judicial order; and the power to him to do so was a nullity, even between the parties. C. C. 3132. It follows that the transfer which was made of the stock under this power, was also a nullity. But the nullity of the assignment of the ownership of the stock, leaves defendant's right as pledgee in full force. *Ibid.*

6. As to any informality in the pledge, as for instance, the want of the act of pledge required by Article 3125 of the Code, the syndic of the pledgor cannot disturb the pledge on any such ground, when the contract was made in good faith, and no creditor was injured thereby. *Ibid.*

7. The pretended pledge of the bank stock was void as to other, and even subsequent creditors of C., and it invested S. with no privilege upon the stock, under Articles 3124, 3125 of the Civil Code, which were in full force at the time. SPOFFORD, J., with whom concurred LEA, J., dissenting. *Ibid.*

8. An insolvent cannot be subjected to more than one trial for fraud, under the Act of 1840, for the same fraudulent acts. One conviction or acquittal, is conclusive upon all the creditors who were parties to the insolvent proceedings. *Leland* v. *Rose*, 268.

INSOLVENCY AND INSOLVENT PROCEEDINGS (*Continued.*)

9. The commissions of syndics upon the property sold take precedence of the vendor's privilege as an expense of administration resulting to the benefit of the vendor, but not so the fees of the counsel for insolvent, nor the counsel for syndic, nor the attorney of absent heirs.

Marsh v. *His Creditors*, 469.

See RESPITE.

INSURANCE.

1. Where property insured by the vendor was sold, and the policy not assigned to the vendee, the latter cannot, after a loss, recover from the vendor the amount of insurance collected by him.

King v. *Preston*, 95.

2. Liability for contribution to a general average rests upon the broad and equitable principle that no one shall enrich himself at another's expense.

Meeker v. *Klemm*, 104.

3. The measure of each person's contributory share to a general average should be regulated proportionally by the extent to which each of the contributing parties has been benefited by the sacrifice. *Ibid.*

4. The valuation of a ship or vessel in a policy of insurance, when disputed and discredited by evidence creating a reasonable probability of its incorrectness, cannot be assumed as an arbitrary basis in an apportionment for a general average contribution. *Ibid.*

5. A liability for a general average contribution cannot properly be called a risk; it is an obligation incident to a sacrifice made to avert a risk. It is based upon the equitable rule that no one should enrich himself at another's expense. *Hunter* v. *N. Y. Mutual Ins. Co.*, 139.

6. A valid abandonment passes the property in the vessel to the underwriters, and from that moment, at least, the captain becomes the agent of the underwriters, and his sale of the vessel, however reprehensible it may be, is made for their account and cannot relieve them from liability.

Phillips v. *St. Louis Insurance Co.* 459.

7. In estimating the cost of repairs in order to ascertain whether it will exceed fifty per cent. of the ship's value, the deduction of one-third new for old is not to be made; that rule applies to repairs made in certain cases of partial, or average losses, and seems to have been extended to a case of technical total loss only by local usages in two or three States. *Ibid.*

8. Where but two-thirds of the valuation is insured, the owner is his own underwriter for the balance, and the net proceeds of the sale of the vessel, should be divided as salvage between the parties, in proportion to the amount each had at risk. *Ibid.*

9. A person having effected insurance with a company in its corporate capacity, and having received from it the payments made under the supposed obligation growing out of that contract, will not be permitted to deny the corporate existence of said company, when sued by it for the restitution of the money thus paid.

The Liverpool Ins. Co. v. *Hunt*, 623.

INSURANCE (*Continued.*)

10. Plaintiff sued on a policy of insurance, upon a floating dock, containing the clause: "Insurance was against all risks." *Held:* That testimony offered to prove that the terms "harbor risks" and "river risks," included the only risks covered by said policy of insurance, and that they have a definitive and settled meaning in the law of insurance, and comprehended only risks from fire, from collision, from extraordinary losses arising from extraordinary perils of the winds and waters, from external accidents only, and not from defects in the thing insured, is inadmissible. In the absence of a custom in regard to "floating docks," by which the terms used in the policy have acquired a particular signification, the construction is one of law, for the courts, upon the instrument itself. The opinion of witnesses upon the evidence, as it did not appear that they were shipwrights, or had any experience in building docks, was properly excluded.

Marcy et al. v. *The Sun Mutual Insurance Co.*, 748.

11. That the terms "all risks" includes all river risks and harbor risks, so far as those risks were applicable to floating docks. *Ibid.*

12. That there was a warranty on the part of the insured that the dock was seaworthy, well built, staunch, and capable of the business in which it was employed, and fitted with machinery and well protected against accidents arising from the ordinary effects of the elements in which it was employed. *Ibid.*

13. That where a loss occurs without any known or apparent cause, the presumption is that such loss was occasioned by the unseaworthiness of the dock; yet this presumption may be rebutted by sufficient positive proof, by disinterested witnesses, of its seaworthiness. *Ibid.*

INTERROGATORIES.

1. Unanswered interrogatories will be taken as confessed, although there is no order of court requiring defendant to answer.

Seaman v. *Babington*, 173.

2. Where interrogatories are propounded to certain witnesses by name, "and others," and crossed without any objection reserved, the depositions of witnesses not named in the affidavit for commission, nor in the interrogatories, are admissible.

Quadras v. *Steamer Daniel Webster*, 203.

3. In reply to interrogatories, plaintiffs said that "they are in the habit of taking out open policies from the insurance offices against fire and river navigation, to cover shipments of all cotton that may be made to them," &c., and that "they pay the premiums of insurance, which they charge in the account of sales to the planters." This answer was made in reply to an interrogatory asking if the insurance was made in a mutual insurance company, "and what dividend or script plaintiffs had received." Answer held to be unsatisfactory. *By the Court:* As the defendant is charged with the premiums, it is but fair that he should be credited with, at least, the value of such amount of scrip as, under a fair apportionment, he would have been entitled to receive.

Brander v. *Lum*, 217.

INTERROGATORIES (*Continued.*)

4. The defendant who has been sued on his draft, has the right to interrogate plaintiff on facts and articles, to show that the draft was given in error, or without consideration. *Kelly* v. *Ledoux*, 688.
5. The rule as to exclusion of parol testimony to contradict written agreements, does not apply in such a case. *Ibid.*

JUDGES.

1. The Act of March 15th, 1855, creating an interchange between the Judges of the Fourth, Seventh and Eighth Judicial Districts, contemplates nothing but a provision for the regular jury terms, as fixed by law, and does not annul the power conferred on every District Judge to call special jury terms, when the public necessity requires them, provided they do not interfere with the discharge of his duties, as imposed by law. *State* v. *Judge of the 7th Dist.*, 66.

JUDGMENT.

1. A reservation in a judgment in a petitory action, by which the right of defendant, or others, to demand that the property recovered should be used as a market, etc., will not restrain the plaintiffs from executing their writ of possession. The effect of the reservation is to allow to the parties in interest a right of action to compel the plaintiffs to use the property in a particular way, should the plaintiff's title contain any such limitation. *David* v. *Municipality No. Two*, 47.
2. A judgment by confession is a "final judgment," for no appeal lies from it. *Hewitt* v. *Stewart*, 100.
3. More than two clear days must elapse between a judgment by default and a definitive judgment, and the error is not corrected by the fact that the judgment was not signed for two days after the definitive judgment was rendered. *Ward* v. *Graves*, 116.
4. A judgment by default in Indiana, after personal citation, when sued upon in this State, cannot be opened to let in a defence that might have been pleaded to the original action. *Davis* v. *Dugas*, 118.
5. The action of debt will lie here if it will lie in Indiana; the judgment is shown to be executed in Indiana, but even if an affidavit, or *scire facias*, were required to revive it there, the action of debt answers the same purpose. *Ibid.*
6. A judgment by default, confirmed by one law partner, who was ignorant that the other had given time to defendant's counsel to file an answer, will be reversed. *Brooks* v. *Cavanaugh*, 183.
7. Where a decree of court is rendered "*by reason of the consent of parties, plaintiff and defendant*," it does not matter whether the consent was given in writing, or verbally, it will be presumed, until the contrary is made to appear, to have been given in such a way as to justify the decree. *Woodward* v. *Lurty*, 280.
8. Foreign judgments have no executory force in this State until they acquire it by the judgment and fiat of our own tribunals. To procure such a fiat a personal action must be brought upon the judgment—an action, the prescription of which is governed by Article 3508 of the Code. *Succession of Lucas*, 296.

JUDGMENT (*Continued.*)

9. Where it was stipulated, in a consent judgment, that an intervention, to which an exception and answer in reconvention had been filed, should be withdrawn, and the whole litigation terminated—*Held:* That the consent judgment cannot be considered merely as a judgment on the exception, dismissing the intervention, but as a final judgment on the adverse claims of the intervenor and the defendants.

Girod v. *Pargoud*, 329.

10. The validity of a judgment ordering a partition cannot be inquired into, on the trial of an opposition to an administrator's account, which is not based on the partition, and which does not embrace any of the property divided. *Estate of John and Martha Routon*, 621.

11. A judgment, based upon a defective citation, and an attachment that was set aside, is an absolute nullity, which may be urged as matter of defence by any one having an interest. *Williams* v. *Clark*, 761.

See CONSTITUTIONAL LAW—*W. Baton Rouge* v. *Beeman*, 94.

JURIES.

1. Malpractice should be suggested and made probable before the array will be set aside, unless there is some apparent legal defect.

State v. *Cooley*, 79.

2. In all appealable cases the jury are judges both of the law and fact, but in all cases the judge may be required by the counsel of either party to charge the jury in writing. *Tresca* v. *Maddox*, 206.

See SHERIFF—*State* v. *Cooley, J.*, 79.
See INJUNCTIONS—*Haines* v. *Verret*, 122.
See CRIMINAL LAW—*State* v. *Costello*, 288.
State v. *Ballerio*, 81.

JURISDICTION.

1. The Sixth District Court of New Orleans has jurisdiction of a rule against a surety on an appeal bond, the principal in which is dead, and his succession under administration in the Second District Court.

Trimble v. *Brichta*, 271.

See COURTS—*State* v. *Judge 1st Dist. Court*, 187.

LEASE AND LESSOR AND LESSEE.

1. The dissolution of the lease, by the destruction of the premises, does not give the lessee any right to recover back money paid for previous rent.

Schadel v. *St. Martin*, 175.

2. Where a person is injured by the carelessness of a slave, the lessee of the slave is the person first liable to respond in damages, under Art. 2299 of the Code. *Fitzgerald* v. *Ferguson*, 396.

3. Where a slave occasions injury to any one by his negligence, and the lessee has not induced it by any want of vigilance or care on his part, the lessee may recover against the owner of the slave any indemnity for such damages as he may have been obliged to pay third parties.

Ibid.

4. C. F. was injured by the carelessness of a slave in driving a carriage; the slave was hired to defendant, but the title was in B. Plaintiff obtained

LEASE AND LESSOR AND LESSEE (*Continued.*)

a judgment for damages, and B. abandoned the slave, who did not bring enough to satisfy plaintiff's judgment, and the balance was claimed from defendant. *Held:* That in the particular case, both the owner and the lessee were relieved by the abandonment. *By the Court:* Whether there may not be cases where the parties would not be permitted to relieve themselves from a responsibility by a surrender of the slave, as in those cases where particular skill and experience are required, and an incompetent slave is employed as a workman, it is not necessary for us to determine. *Ibid.*

5. Insolvents leased a hotel from S. for one year from the 14th Jan., 1855, for $15,000 per annum, payable in monthly installments of $1,250. In May, 1855, the lease was sold by order of court, and S., the lessor became the purchaser. *Held:* That the purchase of the lease by the lessor extinguished the lease, and the lessor should be put down on the tableau as a creditor of the insolvents only for the sum due at the date of the sale of the lease. For the remaining seven months nothing was due him, as (being the purchaser) the lease was dissolved by confusion. *Bartels* v. *Their Creditors*, 433.

6. The order for the sale of the lease does not say that the purchaser shall assume the payment of the rent, and no such construction is warranted by implication of law. Neither the forced nor voluntary assignment of a lessee's right of occupation carries with it any such obligation. LEA, J., with whom concurred SPOFFORD, J., dissenting. *Ibid.*

7. There are two ways of selling the unexpired term of a lease: one by selling it for a premium, subject to the payment of rent to the landlord; the other by selling or assigning the right of occupation without the assumption of rent. The latter is the more frequent, as it rarely happens that the unexpired term of a lease is worth a premium. LEA, J., with whom concurred SPOFFORD, J., dissenting. *Ibid.*

8. Where a lease is offered for sale upon the condition that the purchaser shall assume the payment of the rent, confusion would take place should the lessor himself become the purchaser. But where the payment of the rent is not to be assumed by the terms of the sale, the rights of the lessor who purchases are not extinguished: he has not acquired any obligation due himself, and the price of the purchase, in such cases is due, not to the lessor, but to the principal lessee, or his representatives. LEA, J., with whom concurred SPOFFORD, J., dissenting. *Ibid.*

9. Defendant was in possession of plaintiff's house under a lease, and when the lease was about to expire, defendant refused to renew it on the terms proposed by plaintiff. Defendant continued to occupy, and was notified by plaintiff that he considered the annual lease renewed, to which defendant responded that he would leave the premises at the end of the month, and continued to notify plaintiff from month to month that he would leave. *Held:* There was no contract, and the relation of lessor and lessee can only be created by contract; and that defendant was only liable for the rent of the house during the period it was actually occupied by him. *Marmiche* v. *Roumieu*, 477.

LEASE AND LESSOR AND LESSEE (*Continued.*)

10. Plaintiff sued defendant for rent. A third party, claiming to be the owner of the land, never having had possession, intervened, and claimed the rent and privilege on the crop. *Held:* That the privity of contract and lessor's privilege existed alone between the lessor and lessee. The intervenor's remedy was by petitory or possessory action, to be brought against the lessor when the tenant disclosed his name. C. P. 43.

McElroy v. *Dean*, 612.

11. The possession of lessee is that of his lessor. C. C. 3404. *Ibid.*

12. The damages which a tenant has the right to recover from his landlord, under Art. 2665 C. C., are those which are the immediate result of the defect in the thing leased. The plaintiff claimed as damages, not only the price of his fixtures, which he lost in consequence of being obliged to abandon *Caffin's* house, by the defect of its construction, but also, the difference in the amount of his profits in the store rented of defendant, and in that to which he removed. *Held:* That plaintiff cannot, under his contract, recover consequential damages of this latter sort. *Redon* v. *Caffin*, 695.

13. Construction of the following clause in a contract of lease: "The State and municipal taxes, over and above the amount now paid by the lessors, shall be chargeable to and reimbursed by the lessees to the lessors." *Held:* That the lessor was entitled to annual reimbursements of whatever sums he paid for taxes, above the amount fixed in said clause. No reference was made in the contract to a final adjustment in 1861; no intimation was given of an intent to keep up a debtor and creditor account of excess and deficiency each year through the term of lease. No account was to be taken of the deficiency; what was "over and above" was provided for. The deficiency was not to benefit the lessees in any case; the excess was to be chargeable to them, and was therefore exigible as soon as paid by the lessors.

Boutté et al. v. *Dubois & Mish*, 755.

LEVEES AND ROADS.

1. Action to recover cost of a side levee, which had become necessary in consequence of the removal back, of the levee above, by the parish of Pointe Coupée. *By the Court:* It is to be presumed that the change in the levee would not have been made by the authorities of Pointe Coupée unless the public safety had required it. It was the duty of the proprietor of the tract below, and of the parish of West Baton Rouge, to accommodate themselves to this change, as much so as if such change had been occasioned by a sudden caving of the banks of the river above. *West Baton Rouge* v. *Bozman*, 94.

2. The discretion in regard to the plan and size of the levees is reposed by law and the regulations of the Police Jury in certain persons, who, in this respect, act in an official capacity. If, in the exercise of their functions, they should err in regard to the size of the work to be constructed, an application to the Police Jury should be made to correct the error. But, as a general rule, after the work is done, and the expense incurred, the Supreme Court will not interfere with the discretion of officers who appear to have acted in good faith. *Ibid.*

LEVEES AND ROADS (*Continued.*)

3. The penalty of a bond given by a purchaser of work to be done on the levee, road, &c., in the parish of Lafourche, cannot be recovered without the production of the *proces verbal* of adjudication, as required by law. *Lafourche* v. *Rossi*, 102.

4. Action of damages for injury to the value of plaintiff's property, by constructing a new levee behind plaintiff's buildings, so as to place them out of the protection of the levee. *Held:* That plaintiff, in claiming damages from defendants, admitted that the levee was constructed by their order, and that, under the pleadings, the regularity in point of form, of their proceedings, as a deliberative body, could not be inquired into. *Dubose* v. *Levee Commissioners*, 163.

5. All landed proprietors, whose property lies adjacent to a navigable stream, hold it subject to certain conditions imposed for the common utility. *Ibid.*

6. There is no law prescribing where the levee opposite the town of Providence should be run. The Levee Inspectors and two freeholders are directed by law to lay off the levees at a suitable distance from the bank of the Mississippi river, and there is nothing in the law to restrain the discretion thus conferred. *By the Court:* But the Commissioners have not an arbitrary discretion; and if they were wantonly and unnecessarily to set the levee so far back as to ruin the plaintiff's property, he would not be without remedy. At the same time, this court will be reluctant to interfere with the exercise of that discretion which is confided to sworn officers living near the locality; and before doing so, will require a clear case of oppression or injustice to be made out on the part of the complainant. *Ibid.*

7. The law concerning the expropriation of private property for public use does not apply to such lands as may be found necessary for levee purposes. *Ibid.*

8. The Act entitled "An Act forming a levee district, to be composed of the parishes of Carroll, Madison and Catahoula, for the better protection of the same from inundation," approved March 18th, 1852, is constitutional. *Yeatman* v. *Crandall*, 220.

9. The Act is not repealed, so as to exempt plaintiff from paying the amount of his tax, by the Act "To reclaim and drain the swamp and overflowed lands donated to the State of Louisiana," &c., approved April 30th, 1853. *Ibid.*

LIBEL.

See DAMAGES—*Tresca* v *Maddox*, 206.

LIS PENDENS.

See MORTGAGES—*Citizens' Bank* v. *Armor*, 468.

MANDAMUS.

1. Inhabitants of a parish who are put to great trouble, inconvenience and injury in reaching the court-house, have such an interest in the erection of a new one in a proper place, as provided by law, as to authorize a mandamus to compel the Police Jury to proceed to the construction of the new court-house. *Watts* v. *Police Jury of Carroll*, 141.

MANDAMUS (*Continued.*)

1. The vote of the Police Jury, refusing to make an appropriation for the building of a court-house, and their inaction with regard to the levy of a tax for many months after the parish site had been selected and reported by the Commissioners, were in violation of the command of the sixth section of the Act of 4th March, 1853; and a mandamus was the suitable remedy. C. P., 844. *Ibid.*

2. A peremptory mandamus will issue to compel the Sheriff to assess and levy a tax within a school district of the parish to pay a judgment against the school directors of such district. *Basset* v. *Babin*, 672.

MANUMISSION.

1. In an act of manumission before a notary and two witnesses, the deceased described M. L. as his "natural daughter slave." This is a sufficient acknowledgment of paternity, although the object of the act was to enfranchise the slave. *Fletcher* v. *Decoudreau*, 59.

2. No form is prescribed for such an acknowledgment, except that the declaration be made in the presence of a notary and two witnesses. (Code 221.) If the declaration be thus made, it seems immaterial whether it be the main object of the act or not. *Ibid.*

MINORS.

1. B., the guardian, appointed in Mississippi, of a minor having property in this State, filed a petition in the proper court, representing that the minor's property here was unproductive, and that she had no other; that it was to the interest of the minor that it should be sold, and the proceeds invested, and being unable to induce any person to become the tutor of the minor, he prayed the appointment of a special tutor and under-tutor, and that a family meeting be convoked to deliberate on the propriety of selling the property. The prayer was allowed, the appointment made, and under the advice of the family meeting the property was sold, and G. became the purchaser. He refused to comply with the terms of the sale, on the ground (among other grounds) that no special tutor could be legally appointed to the minor. *Succession of Coleman*, 109.

2. The appointment of a special tutor in this case was not legal, and the sale was a nullity. *Ibid.*

3. In the sale of minors' property all the formalities of law must be observed for the validity of such sale. *Ibid.*

4. Minors, when they become of age, can always avail themselves of nullities resulting from the omission of any of the formalities established by law in the sale of their property. *Ibid.*

5. The purchaser of a minor's property at a judicial sale cannot be compelled to a compliance with the terms of the sale, unless the proceedings are clothed with all the formalities of law requisite to vest in him a legal title. *Ibid.*

6. The appointment of the special tutor should be considered as mere surplusage. The petition for the sale was made by the foreign guardian,

MINORS (*Continued.*)

and the proceedings of the family meeting advising the sale might have been transmitted to the judge by any relative, or even a stranger. (Lea, J., dissenting, with whom concurred Spofford, J.) *Ibid.*

7. Any embarrassment on the question of the right of the special tutor to receive the price might easily be avoided by making the price payable to the foreign guardian. (Lea, J., dissenting, with whom concurred Spofford, J.) *Ibid.*

8. The whole system of administration of minors' estates in Louisiana is opposed to an anticipation of the means of the minor by purchasing property on credit for his account. *Williams* v. *Chotard*, 247.

9. Article 334 of the Code, which authorizes, under certain circumstances, the mortgage of a minor's property, has reference to property which belongs to the minor at the time of the application of the tutor, and the convening of the family meeting; but a prospective mortgage of property which it is proposed to acquire, is not authorized by the Article. *Ibid.*

10. The tutor of the minor, defendant, had filed a petition, proposing an investment of funds of his ward, to the amount of three thousand five hundred dollars cash, and the advice of the family meeting and judgment of the court followed that proposition. But the tutor only invested one thousand dollars in cash, and created a debt for the remainder. *By the Court:* This variance would release the defendant from the obligation of paying the price of this purchase, even were it such as would have been legally binding on her, if made in accordance with the terms fixed by the family meeting. *Ibid.*

See Family Meeting—*Succession of Landry*, 85.
See Courts—*Succession of Landry*, 85.
See Sale—*Succession of Foulkes*, 593.

MORTGAGES.

1. A judicial mortgage results from a *bona fide* judgment, though rendered on the confession of defendant.
Hewitt v. *Stewart's Executor*, 100.

2. A mortgage is binding between the parties without registry. Code, 3316.
Haines v. *Verret*, 122.

3. The fact that plaintiff had a legal mortgage on the property, for which a writ of possession, issued in favor of W., would not, if true, be a valid reason to stay the execution of the writ. That execution would not impair her mortgage rights. *Ashford* v. *Tibbitts*, 167.

4. The wife's legal mortgage takes effect only from the date when the paraphernal funds went into the husband's hands. *Ibid.*

5. The wife's renunciation is defective when the notary does not detail in the act the nature of the rights she renounced. *Ibid.*

6. Mortgages are so far *stricti juris* that they cannot be extended by implication. *Schadel* v. *St. Martin*, 175.

7. Mortgage certificate of reinscription, as follows: "And the general one against R. M. W., in favor of *Thomas R. Ingalls*, resulting from a judg-

ment rendered by same court as above, on the 9th December, 1839, for six thousand one hundred and sixty-one dollars and sixty-nine cents, interest and costs, being the reinscription made in this office on the 6th of August, 1849, of the same judgment recorded on the 13th December, 1839, in this office; *which original judgment was, on the 16th November, 1843, cancelled and annulled but so far only as it bears on and affect the three squares of ground above described, and no further.*" *By the Court:* It is not pretended but the original mortgage was properly cancelled by the Sheriff. What then was the effect of the reinscription? We think it was merely to continue in force the judicial mortgage, just as it existed previously. The mortgage had no greater force the day after its reinscription, than it had the day before. The reinscription informed *Ingalls*, as it did all the world besides, that the judicial mortgage as to these lots had been cancelled. We do not think *Ingalls* can now be permitted to gainsay the record, which he has caused to be made in the office of Recorder of Mortgages, where alone his judgment could acquire the force of a mortgage, even as against W.

Klein v. *Dewees*, 194.

8. D. D. V., Jr., son of D. D. V., the deceased, mortgaged a house to G. The mortgage contained the pact *de non alienando*. G. transferred the mortgage, by public act, with subrogation to V., and afterwards D. D. V., Jr., sold the property to his father, who died; and the property was duly inventoried as belonging to the succession. The succession property was ordered to be sold. The house was accordingly sold, and bought by M. In the meantime V. obtained an order of seizure and sale, under which the house was sold and V. became the purchaser. On a rule taken by the administratrix to raise the mortgage, it was *Held:* That the mortgage of V. was superior to the title of the deceased, and as the mortgage contained the pact *de non alienando*, V. had the right to pursue the property by executory process, not only in the hands of the administratrix, but against any purchaser of the property at the sale of the property of deceased.

Succession of Vancourt, 383.

9. It is the effect of the inscription, and not the effect of the mortgage, which ceases at the expiration of ten years, unless there be a reinscription within that time; and hence the reinscription after ten years has effect only from the date of the reinscription.

West Baton Rouge v. *Bergeron*, 390.

10. The removal of a mortgaged slave from Louisiana to Alabama, and his subsequent sale there, cannot be set up in this State as a bar to the mortgage existing prior to his removal.

Flemming v. *Rotchford*, 400.

11. By Article 2428 of the Code, a thing claimed by suit cannot be alienated pending the suit by the defendant, to the prejudice of the plaintiff. Mortgage is a quasi alienation, and if made pending a suit for the property, cannot prejudice the plaintiff. *Citizens' Bank* v. *Armor*, 468.

MORTGAGES (*Continued.*)

12. Where mortgage creditors not only did not oppose the sale by the syndic of the mortgage property, and did not endeavor to enforce against him the pact *de non alienando*, but took a rule upon him to compel him to sell the property for cash, they cannot complain that the proceeds of the sale are burthened with the charge of the surrender, the movables proving insufficient. *Devron* v. *His Creditors*, 489.

13. *By the Court:* We are not prepared to say that a privilege for law charges does not attach as well to property mortgaged with the foregoing pact as without it, so long as the title to the property has not been divested by a sale. The pact gives the creditor a more easy mode of seizing the mortgage property, but does not elevate his mortgage into a privilege. *Ibid.*

14. The proceeds of mortgaged property ought to be applied, whether there are one or several immovables, to the payment of the privileges in the order in which the property was mortgaged, commencing with the most recent and ascending to the most ancient. *Ibid.*

15. The mode of contribution to debts privileged generally upon movables and immovables has been judicially determined. The decisions are that the immovables, not the mortgage creditors, owed the contribution, and that these privilege debts must be borne by the immovables *pro rata*, according to the price which they produced respectively, and this rule is not opposed to Articles 3236, 3237 of the the Code. Sporrorn, J., with whom concurred Lea, J., dissenting. *Ibid.*

16. Where the purchaser took a rule on the prior mortgage creditors to release mortgages and distribute the purchase money, the latter may insist on their mortgage rights, and subject the property to the payment of their debts. *Bach* v. *Lakin*, 489.

17. The statute of 1855, relative to bonds of State and parish officers, so far as it relates to the enforcement of the rights created by the registry of the bond is purely remediable, and in no manner affects the previously existing rights, the enforcement of which it was intended to facilitate. It was intended to give to the registry of the bond, as to property sold after its registry, the same effect as that conferred on acts of sale by the clause of non-alienation. *Fluker* v. *Bobo et al.* 609.

18. The mortgage created by the act was intended to secure the bond. There is nothing in the legislation on the subject which justifies the inference that the bond was intended exclusively for the benefit of the State. It enured to the benefit of any person who had a claim against the Sheriff for malfeasance in office. *By the Court:* The provisions of the statute are applicable to "all public officers" who, under existing or prospective legislation, were "required to give bond." The Act of 1855 did not repeal the Acts of 1847 and 1848, so far as the provisions of these Acts were reënacted in the revisory legislation of 1855. *Ibid.*

19. The offspring of slave mothers, born whilst the mothers are affected by a mortgage or privilege, are born subject to the same mortgage or privilege. *Solibellas* v. *Consolidated Association*, 682.

MORTGAGES (*Continued.*)

10. The power to hypothecate must be express and special. C. C. 2966.
Levasseur v. *Martin*, 684.

11. The Archbishop of the Catholic Church of Louisiana cannot, without authorization, lawfully mortgage or encumber the real estate belonging to the church. *Ibid.*

12. The tacit mortgage in favor of a minor cannot be enforced against the purchasers of property of a succession which was sold to pay a community debt, to which the minors' interest was subordinate.
Rachel v. *Rachel*, 687.

See Suits and Suppeno—*Wickham* v. *Levistones*, 702.

NATURAL CHILDREN.

1. A document intended as a will, but never probated as such, may be good as an acknowledgment of the paternity of natural children.
Remy v. *Municipality No. Two et al.*, 148.

2. Acknowledged natural children, after having been put in possession of their father's succession—no legitimate heirs having been shown to exist, or none appearing—may prosecute any claim belonging to the succession.
Ibid.

NEW ORLEANS.

1. After the annexation of Lafayette to New Orleans the Legislature required the Parish Recorder of Jefferson to make copies of acts relating to property in Lafayette, for registry in New Orleans. The costs of these copies were fixed by law, and were to be paid by the city of New Orleans. *Held:* There is nothing in such legislation which either violates or impairs the obligation of a contract, or destroys a vested right.
Arnoult v. *New Orleans*, 54.

2. To the city of New Orleans, as a civil corporation, has been delegated a portion of the powers of the government; it was established, as are other city corporations, for the public convenience, and it is certainly competent for the Legislature, from time to time, as the public convenience or necessity may require, to add to or abridge the powers and duties of the corporation, to restrict or enlarge the boundaries of this delegated authority, except so far as they are recognized and guaranteed by the Constitution itself. *Ibid.*

3. A police officer may be entitled to a reward offered by the city, for detecting and bringing to conviction one charged with arson.
Murphy v. *New Orleans*, 323.

4. The ordinance offering the reward was not intended to be temporary, and is still in force. *Ibid.*

5. The third paragraph of the twentieth section of the Act of 8th March, 1836, supposing it to be in force, is not violated by the city ordinance of 21st December, 1854. *New Orleans* v. *Staiger*, 68.

6. The Common Council of New Orleans authorized the Mayor to appoint "a commissioner, expert or arbitrator" to meet an arbitrator of the plaintiff, and value a piece of land which plaintiff proposed to sell to the city. The two commissioners assessed the value at $10,000, and reported accordingly, and the Mayor recommended payment of that sum, but the

NEW ORLEANS (*Continued.*)

city never paid it. *Held*: there is a wide difference between an expert and an arbitrator, and between both and a commissioner. But in whatever capacity the referees acted, there was nothing in the record to show that they bound the city to pay anything.

Lecroix v. *New Orleans*, 556.

See BANKS AND BANKING—*New Orleans* v. *Southern Bank*, 41.
See CONSTITUTIONAL LAW—*Arnoult* v. *New Orleans*, 54.
See TAXES—*Kathman* v. *New Orleans*, 146.
See REWARD—*Murphy* v. *New Orleans*, 323.

NON-SUIT.

1. Where a plaintiff is seeking to recover from a defendant a sum of money, or to enforce from him the recognition of some right, or the performance of some obligation, a trial had in the absence of the plaintiffs will entitle defendant merely to a judgment of non-suit as against the plaintiff. But this rule is strictly applicable to cases where the position of the party sued is purely defensive, and it cannot be extended to cases where the defendant is himself obstructed in the recognition or enforcement of his own rights, or counter claims against the plaintiff.

Moch v. *Garthwaite*, 287.

NOVATION.

1. The delegation by which a debtor gives to the creditor another debtor, who obliges himself toward such creditor, does not operate a novation, unless the creditor has expressly declared that he intends to discharge his debtor who has made the delegation. *Jackson* v. *Williams*, 93.
2. Suit brought by the creditor against the delegated debtor is not evidence of intention to discharge the original debtor. *Ibid.*
3. The debt due a community creditor is not necessarily novated by his taking the individual note of the surviving spouse, with mortgage to secure its payment. *Rachel* v. *Rachel*, 687.

See EXECUTION—*Prescott* v. *Lewis*, 184.

NUISANCE.

1. A cemetary is an indispensible part of every city, or town, and wherever situated, must be in the neighborhood of private property. Such cemetary is not a nuisance because it depreciates the marketable value of the property in its neighborhood. *New Orleans* v. *Church of St. Louis*, 244.

NULLITY.

See JUDGMENT—*Williams* v. *Clark*, 761.

OCCUPANCY.

1. The digging of ditches for the purpose of draining water from an adjoining property, the felling of trees, and the occasional cutting of wood on uncultivated land, are acts which do not necessarily partake of the character of detention, or intended occupancy.

Delavigne v. *Williamson*, 250.

2. The possession of a front tract of land held under a different title, as a distinct and separate property, cannot be considered as extending to a tract claimed under an alleged title from the United States, and subject to a reservation in favor of a third person. *Ibid.*

OFFICES AND OFFICERS.

1. It will not be presumed on slight testimony that sworn officers have violated their duty in matters of discretion confided to them. Those who allege an illegal exercise of that discretion should be held to establish such allegation by conclusive proof. *Rodolphe* v. *New Orleans*, 242.

See Attorney at Law—*Helstand* v. *Labatt*, 30.
See Clerks of Court—*Wills* v. *Derbes*, 50.
See Sheriff—*Bell* v. *Hufty*, 308.
See Mortgages—*Holmes* v. *Wills*, 439.
See Statutes—*Marsh* v. *His Creditors*, 469.
See Harbor Master—*Ivy* v. *Lusk*, 496.

OVERSEER.

1. The fact that an overseer had shot at one of the negroes under his charge who was endeavoring to escape punishment, justified his employer in discharging him. *Wilson* v. *Bossier*, 640.

PARTNERS AND PARTNERSHIPS.

1. Parties engaged in the purchase of materials, and the manufacture thereof into carriages for sale, are liable as commercial partners; but mechanics, who make carriages to order, or repair them, would not necessarily be commercial partners. *Cowand* v. *Pulley*, 1.

2. On the death of B. B. the partnership of B. B. & Co. owed his widow a sum of money. The widow married V., the surviving partner of B. B. & Co., who formed a new partnership with G. C. B. In this contract of partnership the wife of V. intervened, and consented that the money due her as widow in community of her late husband, should remain with the new firm as a loan, upon which she was to receive interest quarterly. *By the Court:* The terms of the contract of partnership show conclusively that Mrs. V. was not a partner, but a creditor. *Brower* v. *His Creditors*, 117.

3. The stipulation in the act of partnership by which Mrs. V. agrees not to be considered as a creditor until all the other debts are provided for, is a contract of suretyship for her husband, for the benefit of his creditors It is a contract entered into by her, without any consideration enuring to her own benefit, both for her husband and conjointly with him, by which she renounces her own rights as a creditor for the benefit of those who may hereafter become the creditors. Such a stipulation is repudiated by the spirit and letter of our laws. *Ibid.*

4. Although the firm of *O'Connel & Gould* had been dissolved before the commencement of the action instituted by the defendants against plaintiff, yet all the partners of the firm of *O'Connel & Gould* were bound *in solido* for all the debts of the firm, and liable to be sued for them. *Gould* v. *Gardner*, 289.

5. Defendants received a claim for collection from D. T. W. & Co. The firm of D. T. W. & Co. was dissolved, and B. who had been one of the members, instructed defendants to put the proceeds of the claim, when collected, to the credit of plaintiff, which defendants accordingly did, and so instructed B. and the plaintiff. Subsequently defendants paid the money under instructions from D. T. W., as liquidating partner of D. T. W. & Co. Plaintiff then brought this suit for the amount of the

PARTNERS AND PARTNERSHIP (*Continued.*)

claim. *Held:* That after defendants had notified plaintiff that, as requested by B., they had placed the money collected to plaintiff's credit, they had no right to divest the funds without plaintiff 's assent; that having done so, they were liable to plaintiff. *Durkee* v. *Price*, 333.

6. After the dissolution of partnership, no one of the partners can use the social name so as to bind the others; and to draw or endorse a note in the name of the former partnership, the authority must be express and special. Any subsequent power must be derived, not from the previous relations of the parties as partners, but from a new contract, which is one of mandate, and this mandate must be express and special. VOORHIES, J., dissenting. *Ibid.*

7. No one of the partners, after the dissolution, can alienate anything more than his own interest in the partnership property. He is not permitted to do any act, still less, to make use of the partnership funds in a manner inconsistent with the purpose of a just and proper settlement. VOORHIES, J., dissenting. *Ibid.*

8. A partner whose interest in the partnership is for two-seventeenths of the profits and loss, is liable in that proportion to one of his co-partners who extinguishes this liability to third persons, whether by payment or novation. *Maginnis* v. *Crosby*, 400.

9. A contract, however inartificially or obscurely drawn, by which two persons agree to furnish merchandise "to the concern" and stipulate that one should act as salesman and the other pass as the proprietor, and that both should share equally in the expense and profits, constitutes a partnership between the parties. *Marks* v. *Stein*, 509.

10. And one party cannot sue the other upon an account for any specific sum, until the affairs of the partnership have been liquidated. *Ibid.*

11. A partnership formed for the purpose of running a steam-sawmill, and making and selling lumber, and carrying on the lumber business generally, is a commercial partnership. C. C. 2796.
Copley v. *Lawhead*, 615.

12. It is well settled that partnership books are evidence for and against the partners, in controversies arising among themselves, but only the books, and entries contained in them, at the time of the dissolution of the partnership. The entries made after this time by one of the partners, who has possession and care of the books, cannot bind the other partners, unless he has also had the books in his possession, examined the entries and, when he had the means of ascertaining their correctness, made no objection, or in some similar manner acquiesced in or approved of the books. *Pratt* v. *McHatton*, 260.

13. By the contract of partnership, two of the partners (defendants) were required to transact the out-door business, and superintend the sales. *Held:* They could not be expected to attend at remote places, nor await the slow process of sales at the principal points where goods were in store for the purpose of being offered for sale; and they are entitled to a credit for commissions for sales actually paid by them in good faith. *Ibid.*

PARTNERS AND PARTNERSHIP (*Continued.*)

14. In order to hold one of the partners liable for losses on the sales of goods, it should be shown that he violated the obligations imposed upon him by the contract of partnership; and that the partners objected to his acts as soon as advised of them, or within a reasonable time after the entries in regard to such sales had been made upon the books of the firm. It is not enough to await the result of the sales to ascertain whether the same have been fortunate, or unfortunate, before objecting. *Ibid.*

15. Defendants, who assumed the collection of outstanding debts, assumed as *negotiorum gestores*, the obligation of using due diligence. *Ibid.*

16. The appointment of a liquidator for the settlement of partnership affairs rests, in a great measure, in the sound discretion of the court. *Ibid.*

17. Accounts due a partnership in liquidation should not be sold, unless the trouble, expense and delay of collecting, will render them less productive to the firm than their immediate sale; or unless they are desperate, or of little value, and the delay in regard to their collection, prevents a final decree of partition within a reasonable time. These and like reasons, render a sale proper.

18. Charges for interest made since the dissolution of the partnership, must be confined to such sums as the respective partners had promised to bring into the partnership, or for funds withdrawn by them, and in the absence of any agreement in writing, the rate must be five per cent. *Ibid.*

19. The lessees of the penitentiary have no right to make any contract for the use or hire of the negro convicts, except in the employment required by law, and any items for such services made by one of the partners must be disallowed. *Ibid.*

20. A several judgment against one, in favor of the other individual partners, should not be rendered where there are available partnership assets by which the amounts received by the partners can be readily equalized. *Ibid.*

21. A steamboat was purchased to be resold, and not to be engaged in the carrying trade. *By the Court:* Under the circumstances the parties were merely joint owners of the property, and not partners, or joint traders within the meaning of the law. *Pickerell* v. *Fisk*, 277.

22. A partnership is founded on the voluntary contract of parties, as contra-distinguished from the relations that may arise between them by the mere operation of law, independent of such contract. *Ibid.*

23. The surviving partner cannot alienate the partnership property. The power to alienate ceases with the dissolution of the partnership; the heirs of the deceased become joint owners of the common property, and the survivor can only dispose of his right in the thing sold. *Ibid.*

See PRINCIPAL AND AGENT—*Stewart* v. *Clark*, 319.

PARTY WALL.

1. Until plaintiff pays defendant one-half of the cost of the wall, it is not a wall in common, but remains the exclusive property of the defendants, though resting one-half upon the plaintiff's land; and defendants may open or shut apertures in it at pleasure, subject only to the police regulations of the city. In this she exercises not a right of servitude, but a right of property. *Jeannin* v. *DeBlanc*, 465.

2. The fact that the plaintiff was indemnified by the insurance company *for his portion* of the wall damaged by the fire, does not impair his right to recover from defendant, reimbursement to the extent of its value, of that portion of the wall which he had rebuilt, and which he was not paid for by the company, and which was not protected by the policy of insurance, and which defendant had used. *Sullivan* v. *Smith*, 701.

PENALTY.

1. When there is a partial execution of the principal obligation, the Judge may modify the penalty, unless there is a contrary agreement. *Schadel* v. *St. Martin*, 175.

PLEADING.

1. It was objected that the plaintiff did not allege in her petition that she was separated in estate from her husband. *By the Court:* No such allegation is necessary. The evidence shows conclusively that the debt originated in a loan of money made by the petitioner, in her own name, out of funds which were paraphernal. She had a right to assume at any time the administration of her paraphernal property, and the taking of this due bill for money lent by herself was itself an act of administration. *Cowand* v. *Pulley*, 1.

2. The defence that the plaintiff has, through his acts, lost any of the securities upon a note, and thereby has become unable to subrogate the surety to his rights, is an admission that the plaintiff did have a demand against the surety, and that the same has been discharged by the act of plaintiff. Such a defense is in the nature of an exception *in factum compositæ*, and should be specially pleaded. *Hoffman* v. *Atkins*, 172.

3. Action of jactitation—plaintiff alleged himself to be the owner and possessor of a certain lot of ground. Defendants excepted that plaintiff had not the necessary possession to maintain the action. The District Court ordered the exception to be referred to the merits—when defendants, after acquiescing in the order, amended the answer and set up title. *Held:* The amendment of defendant's pleadings waived the question of possession, and converted the action into a petitory one, in which the burden of proof was upon the defendants. *Short* v. *Methodist Episcopal Church*, 174.

4. In a suit for taxes, where the defendant, after setting up certain dilatory exceptions, added that should the exceptions be overruled, "the respondent pleads a general denial, and especially the ownership of the property taxed," defendant will not be permitted, under such an answer, to show that he had alienated the property previous to the assessment. *New Orleans* v. *Lacroix*, 198.

PLEADING (*Continued.*)

5. Defendant should have alleged specially what were the errors he complained of in the assessment roll, and that he had, without avail, resorted to the means afforded him by law to correct such errors, or at least allege a sufficient reason for having failed to do so. *Ibid.*

6. A plea of "failure of consideration" in a suit on a promissory note, without specification of the consideration, or of the time, place or circumstance of its failure, is too vague to authorize the admission of proof upon it. *Langstaff* v. *Lees*, 271.

7. It is not customary to file answers to oppositions made to tableaux of distribution; such answers being in the nature of replications. Oppositions in such cases are open to every objection of law and fact, such as minority, fraud, simulation, &c. In case of surprise, a remedy may be afforded by a continuance, or a new trial. *Succession of Lerude*, 386.

8. The plaintiff was, by will, directed to be emancipated as soon as she could be. She sued for her freedom. It was objected that she could not have a decree ordering the defendants to enfranchise her because she had not prayed for it. *Held*: The prayer for general relief was sufficient. *Delphine* v. *Guillet*, 424.

9. Plaintiff offered to prove that she was of good character and sober habits, and had always behaved well and conducted herself respectfully towards white persons; to the reception of which evidence defendants objected on the ground that no such allegations were made in the petition, which objection was sustained by the District Court. *Held:* The defendants, by their answer, having put plaintiff's character and fitness for emancipation at issue, the testimony should have been received. *Ibid.*

10. The defendant, a tutrix, made a declaration of her intention to change her domicil from the parish of West Baton Rouge to New Orleans. The declaration was filed and recorded, and a copy served on the under tutor who, in answer, set up various grounds on which he prayed that the tutrix be decreed to be unworthy to retain the tutorship; that the order confirming her as natural tutrix be rescinded, and that if deemed worthy, she be appointed dative tutrix, on giving security, &c., &c. *Held:* that these issues presented to a simple declaration of intention for a change of domicil, which the party had a clear right to make, are utterly inadmissible, and has no parallel in the jurisprudence of this State. *Elam* v. *Nolan*, 523.

11. The allegation "that plaintiff is about to subject the said schooner or the bond substituted for the release thereof, to the payment of said judgment," is vague, uncertain and in the alternative, and is insufficient to support a demand for an injunction. *Taylor & Co* v. *Clark*, 560.

12. Where land, once public, has become private property, the possessory action will protect the possession of him who holds as owner against the intrusions of all persons, whether claiming the property in virtue of title or not. *Fowler, tutrix*, v. *Duval*, 561.

13. Plaintiff brought suit upon a decree rendered by a Chancery Court in Arkansas, and upon a delivery bond executed by defendants to entitle them

PLEADING (*Continued.*)

to retain possession of certain property seized under an execution issued upon the decree. He alleged, in his petition, "that said bond having been forfeited, acquired the force and effect of a judgment according to the laws of Arkansas; that the original judgment was satisfied and novated in this, that the bond was taken for the delivery of property as aforesaid, and forfeited as aforesaid, and therefore the said bond became a new judgment, having the effect as aforesaid; that both said judgments, the original and statutory judgments, have the effects of and are joint and several judgments, according to the laws of Arkansas." The defendant alleged, in his answer, that the bond set up by plaintiff was false and forged as to his signature. *Held:* that the allegation of novation, with the qualification annexed, is not so absolute as to prevent the plaintiff from recovering on the original decree in chancery. If, therefore, the defendant did not execute the bond, the original judgment was not extinguished: if he did execute the bond the plaintiff is entitled to recover on the forfeited bond. *Jones* v. *Moore*, 616.

14. An exception of want of amicable demand will not lie when defendant, prior to being sued, has refused payment of a smaller sum than that claimed in the petition. C. P. 984.
Figuras v. *Administrator of Benoist*, 683.

15. Allegations contradictory of each other cannot be heard.
Edson v. *Freret*, 710.

16. An expert sued the plaintiffs in the suit in which he had been appointed, for compensation for his services; no citation having been made on one of said plaintiffs, it was objected by the other that the liability of co-plaintiffs for costs being joint, both should have been cited: *Held*, that the objection should have been pleaded as an exception, *in limine litis*.
Dunbar v. *Murphy*, 718.

17. Plaintiff died pending the suit in the District Court of Caddo, the administrator of his succession also died. There being no publication to fill his vacancy, the Clerk of the court, representing the succession, entered appearance, *ex officio*, in the Supreme Court—*Held:* That he could do so under the circumstances by the provisions of the Act of 1855, without proof of his appointment of administrator.
Allen v. *May & Kohn*, 627.

18. Complaint of the non-joinder of other parties defendant and the misjoinder of plaintiffs, can not be made when the case stands at issue on the merits. *Brewer, Ex'r, et al.* v. *Cook*, 637.

19. It did not appear that defendant had any establishment or agent in the parish of West Feliciana, at the time suit was brought, and it did appear that he had a house and home in Catahoula, to the jurisdiction of the court of which parish he had excepted—*Held*: Even if he resided alternately in the two parishes, he might have been sued in either.
Ibid.

20. The plea of discussion must be made *in limine litis*.
State v. *Bradley*, 643.

PLEADING (*Continued.*)

21. The petition alleged that plaintiff "is the owner of the following described tract of land, to wit, the lot or fractional number," &c. This description of title is two vague and general to satisfy the requirements of C. P. 172. *Bry et al.* v. *Fouché*, 665.

22. Defendant excepted to the petition on the ground that it did not set forth the plaintiff's title with sufficient clearness. The exception was overruled. On the trial plaintiff offered a patent to prove his title; defendant objected to it as inadmissible under the pleadings, the plaintiff's title not being set forth in the pleadings; his objection having been overruled, he excepted, and then filed an amended answer, and after alleging that he was taken by surprise, attacked the patent on the ground that it had been obtained by fraud. Defendant did not apply for a continuance nor move for a new trial. *Held:* That the exception was well taken, but that the defendant, by his amended answer attacking plaintiff's title, was precluded from availing himself of the defect in the petition. *Ibid.*

See SURRENDER—*Leland & Co.* v. *Rose*, 69.
See CITATION—*Succession of Penny*, 197.
See EVIDENCE—*Patterson* v. *Tompkins*, 452.
Jeannin v. *De Blanc*, 465.
See ESTOPPEL—*Dorvin* v. *Wills*, 514.

PRACTICE.

1. Defendant had summoned more than forty witnesses, and asked for attachments, which the court refused him without security for the costs of all attachments exceeding six. *By the Court:* There is no averment that he expected to prove anything material by the absent witnesses, nor that he was unable to give the security required. Much discretion must be left to the Judges of the first instance in such a matter as this, in order to prevent the abuse of the process of the court.
Julia Haughton v. *Her Husband*, 200.

2. Where the witness had lived several months in defendant's house, and defendant was present at the trial and cross examined witness, he cannot allege surprise, or claim a new trial, to inquire into the competency, or credibility of the witness. *Ibid.*

3. The sale under *fi. fa.* set aside for want of valid writ and notice.
Webb v. *Coons*, 252.

4. Where the husband joins the wife in the suit, and the petition alleges that the wife is herein authorized and assisted by her husband, it is a sufficient authorization for the wife to sue.
Dunn v. *Woodward*, 265.

5. Where the answer shows that the bill was drawn to release the boat from a seizure, it is too late to object that the captain of the steamboat was without authority to draw the bill.
Anderson v. *Folger*, 269.

6. A sufficient authorization for the wife to appear is shown, when she and her husband were duly cited; both filed their answer on the same day—were represented by the same counsel—and the wife, in her answer, expressly alleges that she was duly authorized to appear and defend the suit. *Woodward* v. *Lurty*, 280.

PRACTICE (*Continued.*)

7. Suit for taxes. Defendant excepted that he had been cited as *B. Saloy*. Exception overruled, and citation ordered to be amended *nunc pro tunc*. *By the Court:* In a matter of taxes where the party appears, as in this instance, and admits that he is cited, we think the court might well order the correction of the name, where merely inaccurately spelled, instanter, and proceed with the cause. The case might be different where judgment was taken in a proceeding of this kind against a party, in his absence, by a wrong name. *New Orleans* v. *Saloy*, 420.

8. Matters properly triable in a hypothecary action, should, after the parties have gone to trial, be determined by the court, on a rule, where the proceeding had not been objected to at the proper time.
Bach v. *Lakin*, 489.

9. A rule against a surety on an attachment, if taken after the actual return of an execution against the principal, is regular, even though taken before the return day named in the execution.
Doane v. *New Orleans and Ohio Telegraph Co.*, 504.

10. When the co-plaintiff or co-defendant dies, pending a case in the High Court of Errors and Appeals of Mississippi, the practice is to suggest the death on record, and to let the cause proceed.
Muncaster v. *Bland*, 507.

11. Plaintiff sued for the nullity of a judgment, and for an injunction to restrain the execution of a *fi. fa.* issued under it. The defendant in the injunction and the owner of the judgment directed the Sheriff to release the seizure, and afterwards made a motion in open court for the release of the seizure, which motion was allowed, but the District Court went further, and ordered the suit to be dismissed. *Held:* that the order dismissing the suit was improperly made, the plaintiff having a clear right to a trial of the issue of nullity of the judgment.
Leverich v. *Adams*, 510.

12. No special order to answer is necessary when the interrogatories are annexed to the petition, and the garnishees are duly cited.
Elder v. *Rogers et als.*, 606.

13. The Act of 20th March, 1839, p. 168, assimilates parties cited under its provisions to garnishees, and makes them liable in the same manner. The garnishees must answer within the usual delay, and in case of his refusal or neglect to do so, it shall be considered as a confession of his having property in his hands belonging to the debtor sufficient to satisfy the demand. *Ibid.*

14. It is in the sound discretion of the District Judges to rescind their interlocutory orders. *Ibid.*

15. An order, rendered on an *exparte* motion, that the interrogatories be taken as confessed, is not a definitive judgment, and no formal motion for a new trial is necessary in order to have it set aside. *Ibid.*

16. It is a sufficient evidence of a Clerk of a District Court in this State, being the administrator of an estate, which he assumes to administer ex

PRACTICE (*Continued.*)

officio under the Act of 1855, that he files a written appearance in this court as such. No order of court, oath, bond or letters of administration are required to authenticate his capacity.

Garcia v. *Kitchings et al.*, 642.

17. An exception to the capacity of plaintiff to sue will be considered as waived by a trial on the merits without any judgment on the exception.

Phabe v. *Vienne*, 688.

18. A judgment was rendered by the Supreme Court, wherein it was ordered "that the heirs of *Jean Junek* be recognized as entitled to one-half interest in the partnership established between their late father and *L. F. Hezeau;* that it be decreed that said partnership has continued since the death of their father, and still exists between the said *Hezeau* and the said heirs of *Junek*, and that said heirs are entitled, through their tutrix, to exercise all their rights, incident to their capacity as partners, for the protection and management of their interest in said partnership," &c. The mandate of the court having been filed in the court *a quo*, plaintiff obtained a writ of possession, by which the Sheriff was ordered to put her in possession of the premises, without reserve or exception, together with superintendence, &c., of the same. The defendant obtained a rule on plaintiff, to show cause why said writ should not be set aside. *Held:* Where a mattter of defence is set up against the execution of a writ regularly issued, it is, perhaps, irregular to proceed by rule, but where the issue has reference to the regularity of the writ itself, the proceeding, being a mere incident to the judgment, may be disposed of summarily.

Junek v. *Hezeau*, 731.

19. The judgment of this court did not decree that plaintiff was entitled to the exclusive possession of the entire entablishment appertaining to the partnership, nor that she should divest defendant of his possession nor (so far as the partnership articles allowed it) his control over the business for which the partnership was established. Judgment affirmed, making the rule absolute.

Ibid.

See PRINCIPAL—*Gilly* v. *Romieu*, 746.
See ATTORNEY AT LAW—*Lacoste* v. *Robert*, 83.
Martin v. *Moore*, 121.
See SHERIFF—*Brand* v. *Johnson*, 278.
See NON-SUIT—*Mock* v. *Garthwaite*, 267.
See CONTINUANCE—*State* v. *Johnston*, 422.
See EVIDENCE—*Ealer* v. *Freret*, 455.
See STREETS—*New Orleans* v. *Dryades Street*, 458.

PRESCRIPTION.

1. The prescription of three years, applicable to a loan of money, does not apply to a due bill given at the time for such a loan.

Cowand v. *Pulley*, 1.

2. The maxim *contra non valentem agere, non currit prescriptio* has been admitted in some instances, where a party was acting to recover or protect his property, but never in order to enable him to inflict a penalty on his adversary.

Matthews & Finlay v. *their Creditors*, 36.

PRESCRIPTION (*Continued.*)

3. There is nothing in the Registry Laws which precludes a title not registered from being the basis of the prescription mentioned in Article 3444 of the Code, when it is accompanied by actual possession and the incidents prescribed in Article 3453. *Watt* v. *Hubnell*, 57.

4. Where the purchaser of land failed to give his notes according to the terms of sale, he cannot set up the prescription of five years. *Succession of Jewell*, 83.

5. A debtor said he would "settle provided his claims were allowed." *Held:* insufficient to interrupt prescription. *Ibid.*

6. The only *indicia* of taking possession by defendant—to make a basis for prescription—before 1844, were that in 1840, he sent hands to aid in stopping a crevasse in front of the tract in question, and that the next year, some of his negroes worked on a road and levee running over a part of it. *By the Court:* It would be contrary to the text and meaning of the Code to declare these *indicia* sufficient to establish such an unequivocal corporal possession—*animo domini*—as is required to mark the commencement of the prescription of ten years. Defendant had other lands in the vicinage. He had an obvious interest in stopping the crevasse and assisting to keep the road and levee in repair, and his doing so did not clearly indicate an intention to take possession of this piece of land as owner. *Doleman* v. *Barrow*, 87.

7. The land in dispute was abandoned by plaintiffs in 1827 or 1828. It is not shown that they exercised any act of ownership over the land from that period until the institution of this suit—a period of twenty-two or three years—and under Article 3467 C. C., it would seem that the plaintiffs have lost their civil possession, because they did not pay taxes, keep up the roads and levees, or do other similar acts. (MERRICK, C. J., dissenting.) *Ibid.*

8. While on the one hand, the positive acts of defendant show possession before 1844, much can be inferred, on the other, from the passive conduct of plaintiffs, which seems to have amounted to an intention of ridding themselves of the burden of taxes and keeping up levees, by abandoning the property to the purchaser at the tax sale and his vendees. (MERRICK, C. J., dissenting.) *Ibid.*

9. Three-fourths of the territory of the State, consisting of forests, prairies, swamps and wood lands, for the present at least, admit of scarcely any other possession than that shown by the defendant in this case. To require this sort of real estate to be enclosed, in order to prescribe, would be the virtual abrogation of the provisions of the Code as to a large part of the wealth of the State. (MERRICK, C. J., dissenting. *Ibid.*

10. A title not registered may be the basis of prescription. *Bracy* v. *Buck*, 100.

11. A suit claiming property and rent is a totally different action from that of rescission of a sale for fraud, and will not interrupt prescription as to the latter. *Seavers* v. *Journee*, 143.

PRESCRIPTION (*Continued.*)

12. *Remy* died in the actual possession of the property, which he held under a valid title. There could have been no adverse possession anterior to his death, and, therefore, whatever may have been the character of the alleged possession of the defendants, it should have been accompanied by a title translative of property, and exercised in good faith to form the basis of prescription.

Remy v. *Municipality No. Two*, 148.

13. Possession, to be the basis of prescription, must be inconsistent with an adverse ownership—must be continuous, unequivocal, uninterrupted and with the intention of holding, as owner, or on behalf of one assuming to be owner. In the absence of such adverse possession, the civil possession of the original owner will be presumed to continue.

Ibid.

14. Mere possession of battures and banks of rivers for the public use can in no case form the basis of prescription, because such possession is not incompatible with a right of ownership in a riparian proprietor.

Ibid.

15. An offer by a debtor to give the creditor in payment or discharge of creditor's claims, a tract of land, if the creditor would give one hundred dollars to boot, will not interrupt prescription.

Pearson v. *Harper*, 184.

16. Suit to recover amount of certain notes obtained by defendant from plaintiff and paid by her, as alleged, for defendant's benefit. Plea, prescription of five and ten years. To meet this, the plaintiff urged that the Supreme Court had not decided until 1854 that she was not responsible for the debts of her former husband, and that, previous to that decision, she was not bound to bring this action. *By the Court:* The action of the court in that case did not have the effect of suspending the course of prescription against her.

Wilcox v. *Henderson*, 190.

17. An admission of the execution of a note, accompanied by an assertion that it was not really due because it had been extinguished by compensation, is not such an acknowledgment as will interrupt prescription.

Carrollton R. R. Co. v. *Harper*, 212.

18. Depositaries holding by a precarious tenure cannot prescribe on the thing thus held. But the deposits made with plaintiff's bank were not real but irregular deposits; the ownership of the identical money deposited passed to the bank, and the relation of debtor and creditor in a cash account arose between the parties. *Ibid.*

19. A corporation may plead prescription. *Ibid.*

20. The prescription established by Article 1939 of the Code does not apply to simulated sales. *Dunn v. Woodward*, 265.

21. An action for the recovery of the value of property belonging to a succession for which the defendant has made himself liable, is not an action for damages resulting from an offence, or a quasi-offence, and the prescription of one year is inapplicable to it.

Pickerell v. *Fisk*, 277.

PRESCRIPTION (*Continued.*)

22. The prescription of actions is regulated by the law of the forum.
Succession of Lucas, 296.

23. The prescription of three years of actions for the recovery of money loaned, is not applicable where there has been an acknowledgment of the loan in writing amounting to an obligation.
Garrahan v. *Curley*, 462.

24. The acknowledgment of the correctness of the account by the captain who contracted for the repairs, withdrew it from the application of Article 3499 of the Code, and subjected it to the prescription provided by Article 3508. LEA, J., with whom concurred SPOFFORD, J., dissenting.
Muntz v. *Broom*, 472.

25. Only adverse possession can be the basis of prescription in Mississippi.
Crane v. *Allen*, 493.

26. In an action against the wife, service of citation on husband or wife is sufficient to interrupt prescription. C. P., 192. The fact that the husband was not personally cited, and the wife not authorized to defend the suit until after the term of prescription pleaded had elapsed, did not destroy the effect of a legal service of citation upon the wife.
Bush v. *Decuir*, 503.

27. Privileges for wages of crew is prescribed by sixty days. The rule is the same as to the furnishers of supplies. Such items of both as fall within sixty days are allowed, rateably. Civil Code, 3205.
Mooney v. *Brig Hondurino*, 538.

28. The prescription of one year to actions for *quasi offences* is not applicable. The case is one *ex contractu* and not *ex delicto*.
Magoffin v. *Cowan*, 554.

29. The heirs of G. were bound to account for the proceeds of the batture conveyed to M. when called upon, but the right of action only accrued when the money was received, which, being less than two years before this suit was brought, the prescription of ten, twenty and thirty years could not avail. *Michon* v. *Gravier*, 596.

30. The principles decided in *Roselius* v. *Delachaise*, 5 Ann., affirmed.
Ibid.

31. In the absence of an appeal or action of nullity, no irregularity in the form of proceeding before the district court can be inquired into after the lapse of one year. When the police jury has been regularly cited or made its appearance, no inquiry can be entertained after the lapse of that period, as to whether the power to confess judgment was or was not formally conferred by sufficient authority.
Parker v. *Scogin*, 629.

32. An action for the dissolution of a sale for non-payment of the price is not in legal parlance action of *nullity* or *rescission*, and is not regulated, as to prescription, either by Art. 2507 or Art. 2218 C. C.: it falls rather within the general category of personal actions, limited to ten years by Art. 3508. *George* v. *Lewis*, 654.

PRESCRIPTION (*Continued.*)

33. An action of nullity or rescission of a contract lies only for an alleged vice in the contract itself, tainting it *ab initio;* whereas, the dissolving condition is never enforced except upon the happening of some event posterior in date to the contract and not affecting its original validity. Nullity and rescission imply the total avoidance of the convention of the parties for some inherent defect therein; the dissolution of a commutative contract for non-compliance by either party with his engagements, is really the carrying into effect of a part of their convention either express or implied. *Ibid.*

34. The maxim *contra non valentem agere non currit prescriptio* does not apply to relieve the plaintiff in a case where the plea of prescription was set up by the defendants, *acquirenda causa.* It has been applied to prescriptions, *liberanda causa,* in three classes of cases: 1st. Where there was some cause which prevented the courts or their officers from acting or taking cognizance of the plaintiff's action. A class of cases recognized by the Roman law, as proper for the allowance of the *utile tempus.* The cases of *Querry's Ex.* v. *Toussier's Ex.*, 4 M. R. 609; *Ayraud* v. *Babin's Heirs*, 7 N. S. 481; and *Smith* v. *Taylor*, 10 R. R. 133, are of this kind. 2d. Where there was some condition or matter coupled with the contract or connected with the proceedings, which prevented the creditor from suing or acting. See cases of *Landry* v. *L'Eglise*, 3 L. R. 219; *Flint* v. *Curry*, 6 L. R. 69. 3d. Where the debtor himself has done some act effectually to prevent the creditor from availing himself of his cause of action. The following are cases of this class: *Boyle* v. *Mann*, 4 An. 170, and *Martin* v. *Jennings*, 10 An. 553. Art. 3444 C. C. and the Act of 1848, p. 60, declare that property in slaves is acquired by the prescription of five years, whether the parties reside in the State or any of them reside out of it. Prescriptions run against all persons unless included in some exception established by law. C. C. Art. 3487. *Reynolds* v. *Batson*, 729.

See SLAVES AND SLAVERY—*Eulalie* v. *Long*, 463.

PRINCIPAL AND AGENT.

1. The deposit of a letter in one's box at the post-office is not a delivery of the letter to such person: and where a clerk, who had been discharged by defendant for dishonesty, obtained a letter containing money out of defendant's box at the post-office, which money he kept, defendant held not liable to the party remitting the money.

Johnson v. *Martin*, 27.

2. An agent may properly be held responsible for a neglect to provide against the risks or perils to which property entrusted to his care may, in the ordinary course of business, be exposed, but he cannot be held liable for not anticipating a danger altogether out of the ordinary course of business or natural events. *Ibid.*

3. The maxim that money has no identity, when applied to agents, is true in this sense: if it is deposited in bank in the name of the agent, with his own funds, or kept with his own money, it cannot be identified, and

PRINCIPAL AND AGENT (*Continued.*)

must necessarily be held to belong to the agent, in any contest between the principal and third persons claiming the same.

Beatty v. *McCleod*, 76.

4. So also if the agent pays out the money to one who receives it in good faith, it cannot be recovered back—it has no identity. *Ibid.*

5. But this doctrine has never been held to extend to cases where the money has become capable of a complete identification from the manner in which it has been kept—as in packages, labeled in the name of the principal, or deposited by the agent in bank in the name of the principal. *Ibid.*

6. When the agent makes the deposit in the name of the principal, it is to be presumed that the money he so deposited is the identical money which he received from or on account of his principal. *Ibid.*

7. A tutor, who was insolvent, believed himself about to die, deposited a sum of money with M., stating it to be the property of his ward. It was shown that the tutor was in possession of no means but those belonging to his ward, and that he had recently obtained certain notes of his ward to be discounted, amounting to a larger sum than that deposited with M. *By the Court:* As by law the tutor ought not to use the funds of his ward, and as he has the right to deposit such funds in bank in his name as tutor, or to keep them distinct from his own by proper labels, there is no good reason why, on an occasion like the present, he might not deposit the money with some trusty person for safe keeping. *Ibid.*

8. Plaintiff sent her slave from Tennessee to defendant, at New Orleans, for sale. The slave was permitted to go, with one belonging to defendant, (which he kept for such purpose,) to the steamboat for his clothes, whence he escaped, and plaintiff sought to make defendant liable. *By the Court:* The defendant took the slave for sale upon commission; the contract was a mandate mutually beneficial to the parties, and the defendant was bound to the exercise of ordinary diligence; that is, such a degree of diligence as persons of common prudence are accustomed to use in their own affairs of a similar nature. *Hill* v. *White*, 170.

9. There was in the knowledge of plaintiff's agent, who brought the slave to New Orleans, facts which showed that more than ordinary diligence would be requisite to prevent the slave's escape; and these facts being withheld from defendant, he cannot be made liable. *Ibid.*

10. The charge of forty-five cents per bale, made against defendant, for drayage, labor, storage, weighing, &c., of defendant's cotton, cannot be recovered, unless actually paid by plaintiff. *Brander* v. *Lum*, 217.

11. Where the principal, though present, is physically incapable, from sickness, of making an affidavit for a provisional seizure, the affidavit may be made by an agent. *Schneider* v. *Vercker*, 274.

12. It is not necessary that the agency be sworn to, it is sufficient to allege and prove it. *Ibid.*

13. Plaintiff enclosed an account against defendants to P. & H., (partners,) with instructions to take all necessary steps for the collection of the same. P. made an affidavit for and obtained a sequestration, which was

set aside, and plaintiff appealed. *By the Court:* The authority conferred on the agents was that of taking all necessary steps for the collection of the plaintiff's debt. Either of the partners was competent to act for the plaintiff in the matter. The affidavit points to the necessity which existed for the sequestration as a necessary step for the collection of the debt. The plaintiff was not present. Under the statute of 1838, his agent was authorized to make affidavit and give bond.

Stewart v. *Clark*, 319.

14. M., one of the partners, defendants, was the agent of the Bank of Kentucky. Pending this agency, defendants received from S., L. & Co., of Louisville, a consignment of flour, which they were directed to sell and retain proceeds towards payment of a draft drawn by plaintiffs. They sold the flour, and M., acting under instructions from the bank, attached the proceeds. After the attachment, defendants received a dispatch from S., L. & Co., directing them to deliver the flour, or its proceeds, to plaintiffs. *By the Court:* The defendants, as factors, and holding the funds as an irregular deposit, ought not to defeat the arrangement of the parties by taking upon themselves the agency of the Bank of Kentucky. The two agencies are incompatible, and having received the consignment of the flour for a particular purpose without objections, and made a sale, they became absolutely the agents of the parties interested in the shipment of which they had notice, and they cannot be permitted to defeat the very object of the consignment of the flour by diverting the proceeds to their individual claims against S., L. & Co., nor by acting as the agent of third parties. *Gordon* v. *Goodrich*, 410.

15. The duty of a clerk is to treat his employer with respect, and not to insult or wantonly offend those who come to the establishment to transact business. A course of conduct on the part of the clerk inconsistent with this obligation, is certainly one of the very best reasons that can exist for dissolving the contract. *Frederich* v. *Ralli*, 425.

16. Proof that in the ordinary transactions of life one has acted as the agent of another does not show a power nor furnish presumptive evidence of a power to accept donations. *Bush* v. *Decuir*, 503.

17. Where an agent, whose authority having been revoked, rendered his account, showing certain assets in his hands belonging to and a balance of money due his principal, and having offered to pay the same on being released from all his liabilities on account of his agency, which was refused, instituted suit against the principal, to compel the homologation of his account and his discharge from all his responsibilities as agent, on delivering the assets and money, due according thereto: *Held:* that the principal was entitled to a judgment on a rule taken by him, for the money admitted to be due him. *Gilly* v. *Roumieu*, 746.

18. It is no objection to the judgment on the rule that a part of the case was left open for trial. While the mandatary is compelled to render his account, he has the right to retain only a sufficient amount out of the property of the principal in his hands, to satisfy his expenses and costs, and he may even retain, by way of set-off, what the principal owes him, provided the debt be liquidated. C. C. 2973, 2992. *Ibid.*

PRINCIPAL AND SURETY.

1. Where an administrator obtains a judgment against a former administrator, whose estate, as shown by the tableau, is utterly insolvent, no further proceedings need be had by him against the estate of the former administrator, to entitle him to judgment against the surety of the former administrator. *Bourgeat* v. *Adams*, 78.

2. The neglect or delay of the creditor to sue, or to use legal remedies, does not release the surety. *Barnes* v. *Crandall*, 119.

3. The surety is at liberty, if he thinks the creditor not sufficiently energetic, to pay the debt and become subrogated to his right, and manage the claim to his own satisfaction. *Ibid.*

4. It is only in those cases where the surety loses his right of subrogation by the act of the creditor that the surety is discharged. *Ibid.*

5. The discharge of the surety, under Article 3030 of the Code, only takes place to the extent to which the acts of the creditor have prejudiced the recourse of the surety for reimbursement of what he may be obliged to pay under his contract of suretyship. *Provan* v. *Percy*, 179.

6. Article 3032 of the Code applies only to obligations payable at a time specified. Such term cannot be extended without the consent of the surety, and if extended, the entire release of the surety follows. *Ibid.*

7. Equity will not permit the plaintiff and her husband to obtain a judgment against the surety of the tutrix, without accounting for so much of the funds of the plaintiff as were diverted to pay the individual debt of the tutrix and her husband to the plaintiff's husband. The husband is a co-plaintiff in this suit, and it has been shown that the funds of the minor have been received by him in payment of a debt due to him individually by plaintiff's tutrix and her husband. *Fuselier* v. *Babineau*, 393.

8. Where property is seized under attachment, and the property is bonded, the surety, in proceedings against him, will not, after judgment unappealed from by defendant, be allowed to show that the attorneys who filed an answer for the defendant were not authorized to represent the defendant. *Doane* v. *N. O. Telegraph Co.* 504.

9. A surety is bound to ascertain his principal, and where, by mistake, he signs a bond for the lessee of the owner, instead of the owner himself, to release property from attachment, he will be bound; for, if he had not signed the bond, the property would not have been released and the attachment dissolved. *Ibid.*

10. Where, in such a case, judgment has been rendered against the owner, and execution has issued against him, and has been levied on his property, and his lessee enjoins the sale, the surety on the attachment bond, being also surety on the injunction bond, cannot set up his mistake as a defence to proceedings against him. He should not be allowed to aid in defeating the levy, and then set up his own act as matter of defence. *Ibid.*

11. A surety on a bond given for the release of property sequestered by the vendor to satisfy his privilege, is liable to the vendor, notwithstanding the property was seized and sold to satisfy a judgment rendered to in-

PRINCIPAL AND SURETY (*Continued.*)

force the lessor's privilege for rent of premises in which the property had been stored and which existed on the property at the time the sequestration was sued out. The obligation of the bond was "faithfully to present the property to answer the judgment in the case;" it was no compliance with the condition of the bond to present the property to satisfy the execution of a third party. *Clapp* v. *Seibrecht*, 528.

12. It is a complete answer to a suit upon a bond for the release of the sequestration to show that the plaintiff's right upon the property has been overridden and extinguished by a superior right existing at the time and prior to the sequestration. SPOFFORD, J., and LEA, J., dissenting. *Ibid.*

PRIVILEGES.

See MORTGAGES.

1. Injunction of sales by Sheriff, under defendants' execution against J., of three billiard tables claimed by plaintiff under a private writing, which, after reciting the sale to J. by plaintiff, of the billiard tables, says, "it is further understood by the parties that these billiard tables will be the property of *B. Antognini*, until the payment of those notes" (the price.) *By the Court;* This private writing had no date as to third persons—at least no date prior to that of its filing in this suit—and the plaintiff should have proved not only the signature of the document, but that it was made at the date which it bears. The defendants had acquired a lien upon these billiard tables, by their seizure before this suit was brought. *Antognini* v. *Railey*, 275.

2. The plaintiff, as vendor, had no right to enjoin the Sheriff's sale. He had only the right to claim the price, in virtue of the privilege of vendor, by third opposition. *Ibid.*

3. No privilege is granted by law to one who furnished feed for the horses of a keeper of a line of omnibuses employed on such line. *Whipple* v *Hertzberger*, 475.

4. The seizure and even the sale of property does not deprive the vendor of his privilege, so long as the property, or its proceeds, are in the hands of the Sheriff, syndic, administrator, etc., and the property has not been sold confusedly with a mass of other things belonging to the vendee. C. C 3195. *Ibid.*

5. Legal charges and wages of the captain and crew of a vessel are superior in rank of privilege to the claim for repairs of the boat. C. C., Art. 3204. *Fields* v. *His Creditors*, 545.

6. A contractor with the owner of a boat for the repairs, after repairing it, voluntarily delivered it to the Syndic of the owner who since the contract had gone into insolvency. *Held*, that this was an abandonment of the contractor's right to detain the boat until the debt due for repairs should be paid, and that he must look to his privilege alone. C. C. 3204, C. P. 888, 890. *Ibid.*

7. E. constructed buildings for B. under a contract which was duly recorded. Afterwards S., G & Co. purchased the property and buildings at Sheriff's

PRIVILEGES (*Continued.*)

sale; E. drew a draft in favor of Mrs. S. on B., which was accepted by B. in consideration of the amount due for the buildings. Mrs. S. sued E. and B. on the draft and claimed a privilege on the buildings; S., G. & Co., intervened. *Held:* E. had the right to claim from B. the amount due him for constructing the buildings, independent of the draft, and therefore no subrogation was necessary by payment of the draft or otherwise to enable E. to assert any rights which he might have asserted, had no such draft been given. There was no novation of the debt and no payment. E's rights against B's vendee were those of a mortgage creditor against property in the hands of a third person. Mrs. S. was entitled to judgment against B. and E. on the draft, but without privilege; E. to judgment against S., G. & Co., and with privilege.

Swain v *Barrow et al.*, 547.

See HOMESTEAD ACT—*Succession of Aaron*, 671.
Succession of Balzaretti, 674.
See SHIPS AND SHIPPING—*Wickham* v. *Levistones*, 702.

PROHIBITION.

1. In cases in which a party has an adequate remedy by appeal, this court will not listen to an application for a writ of prohibition.

State v. *Judge of Fourth District Court*, 696.

PUBLIC LANDS.

1. The claim of C. to a tract of land was confirmed. Plaintiff employed at his own expense, and without the knowledge of the heirs of C., a surveyor to locate the claim confirmed to C. on other land, and entered the C. tract as subject to private entry, and obtained his patent therefor. The defendant, who claimed under C.'s title, was quieted in his possession by final judgment of the Supreme Court. *Davis* v. *Fletcher*, 506

2. A perfect Spanish grant and survey made by order of the court, wherein the old lines are ascertained in conformity to the grant, and confirmed by the Act of Congress of 3d March, 1819, is valid and conclusive against a preëmption certificate and patent from the United States, as respects the lands embraced in the grant, although the portion of said land embraced in the patent may have been returned as vacant by an officer of the United States. In such case a survey made by officers of the United States are not conclusive evidence of the boundaries of the tract described in the Spanish grant, and courts are at liberty to receive other testimony in relation thereto, and if superior, to decide in favor of such evidence. The rule is different as to imperfect, and other titles emanating from the government of the United States. The approved surveys in such cases are generally, if not always, conclusive. *Fowler* v. *Duval*, 561.

3. A part of the internal improvement lands granted to this State by Act of Congress of September 4, 1841, were located by agents of the State, and for the sale of the unlocated lands an office was created by Act of the Legislature of 1844, the Register and Receiver being authorized to issue warrants for such lands. Under this Act and that of 1847, purchasers of these land warrants become the agents of the State, for the location of so much of the internal improvement lands as was indicated by the warrant. *Hood* v. *Martin*, 552.

PUBLIC LANDS (*Continued.*)

4. The patent issued, pursuant to the approval of such location, could only issue in favor of the person holding the warrant under which the location was made. It cannot be supposed that the Legislature intended to confer upon the Governor the power to grant a patent to any other person than him to whom the State had sold the warrant. *Ibid.*

RAILROADS.

1. The Pontchartrain Railroad Company was incorporated in 1830, with the exclusive privilege of "constructing and using a railroad, or railway, leading to and from the city of New Orleans, its faubourgs, and the incorporated limits thereof, to and from Lake Pontchartrain," etc. In 1833 the New Orleans and Carrollton Railroad Company was incorporated for the construction of a railroad from New Orleans to Carrollton. In 1840 the Jefferson and Lake Pontchartrain Railway Company was incorporated for the construction of a railroad from Carrollton to Lake Pontchartrain. The two last named companies entered into an arrangement by which "through" trains were run from New Orleans to the Lake. The first named company (the plaintiffs) sued out an injunction against the defendants, and asked for damages, because of the alleged violation of the exclusive privilege granted to plaintiffs. *By the Court:* A railroad from New Orleans direct to the terminus of the Jefferson and Lake Pontchartrain Railroad at the Lake would have been an infringment of the privileges granted to the plaintiffs by the act of incorporation. Does the connection of the two points, by means of the union of the two roads by a circuitous route, change the character of the Act. Here we think a distinction must be taken. If the object of the two companies was, in good faith, to accommodate different lines of travel and trade, and not to engross the same travel and trade which would naturally pass over plaintiff's road, it would doubtless be lawful, although occasionally a person might use first one road and then the other to arrive at the lake or city. For it is not so much the motives of the traveling public with which we have to do as it is the motives of the two companies. But if the union of the two roads was made for the purpose of transporting freight or passengers to and from the prohibited points, it is difficult to see on what ground the Act can be maintained. The Legislature could no more grant this power to two or more companies than it could grant the same to one.

Pontchartrain R. R. v. *N. O. & Carrollton R. R. et al.* 253.

2. Neither of the Acts incorporating defendants is unconstitutional in itself, because their roads were not within the prohibited points. But the moment they, by their union, connect these points by railroad, their act becomes unconstitutional (so far as it concerns the direct travel between the two points) as much so as would have been a single Act of incorporation and railroad for the like purpose. *Ibid.*

2. Parol evidence which does not contradict anything in the written proceedings of a corporation is admissible to explain omissions in its proceedings. *V., S. & Texas R. R. Co.* v. *Parish of Ouachita*, 649.

3. Giving full weight to the ordinance of the Police Jury of the parish of

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RAILROADS (*Continued.*)

Ouachita, of June 27, 1853, as an ordinance legally adopted, its adoption cannot be considered as constituting *per se* a subscription to the capital stock of plaintiff. *Ibid.*

4. The Act of 12th of March, 1852, which authorizes Police Juries to subscribe to works of internal improvement, while it required the Police Jury subscribing, to insert in the ordinance the number and amount of shares proposed to be subscribed, and the provision by taxation for the payment of the subscription, does not inhibit the insertion of such other clauses and conditions as the Police Jury may think expedient. The ordinance as adopted by the jury, is its proposition to contract, and the corporation to whom this proposition is made must accept it according to its terms and conditions, or else there is no contract. *Ibid.*

5. The Act relative to Police Juries approved 9th of April, 1847, provided that a "vote of all the members elect of Police Juries shall be required to levy any parish tax or to make any appropriation." There is nothing in the Act of the 12th of March, 1852, which is inconsistent with that of 1847, in this particular. *Ibid.*

See TAXES—*Parker* v. *Scogin*, 629.

RECORDER OF MORTGAGES.

1. An interpretation of a statute which must lead to consequences mischievous and absurd is inadmissible, if the statute is susceptible of another interpretation whereby such consequences may be avoided. The legislative intention must be honestly sought after and faithfully executed, if not in conflict with a paramount law. And in cases like this, the meaning must be sought, not merely in the words of the statute itself, but in its subject matter, in the history of the legislation thereupon, in the purpose of the law, the reason of its enactment, and the evil it sought to remedy. *State* v. *Wiltz*, 439.

2. The subject matter of the Act of 14th March, 1855, ("an Act creating a Recorder of Mortgages for the parish of Orleans,") is not the erection of a new office. It seems to imply the recognition of an existing office, whose duties are well known. It does not purport to extinguish that office, and to substitute a new and different one. It provides for the mode of appointing an incumbent to fill it at stated intervals, for the mode of giving his bond, and for the appointment of his deputy, whose duties are to be commensurate with his own, but for whose acts he and his sureties are to be responsible. All these sections relate to the officer, not to the office; the office exists independent of the statute; and these simple provisions about the incumbent constitute its whole subject matter. *Ibid.*

3. The statute in question is in fact but a grouping together in one act of parts of three pre-existing laws, with very slight changes of phraseology, and no change whatever of substance. By it the Legislature has merely said "here is a condensed statement of all the law now in force relative to the mode of appointment, term of service, amount and condition of the bond, and appointment, duties of and responsibility of a deputy of the Recorder of Mortgages for the parish of Orleans: all else, *upon these specified matters*, is repealed. *Ibid.*

RECORDER OF MORTGAGES (*Continued.*)

4. It cannot fairly be inferred that an ancient office was thereby abolished, and a new one created. The literal terms of the statute do not seem to require such a construction; its history, subject matter and purpose alike forbid it. *Ibid.*

6. A person holding an existing office under a fixed tenure cannot be removed, or his regular term of service abridged by an ordinary act of legislation, other than an Act abolishing the office. *The mode of removing officers is prescribed by the Constitution.* *Ibid.*

7. While the history of the legislation, and the circumstances under which the statute was enacted may be inquired into, as furnishing aids to its interpretation, still the plain and unequivocal meaning, according to its received acceptation, of the language in which an Act is expressed, should not be overlooked. LEA, J., dissenting. *Ibid.*

8. Under the Constitution unless the object of a law is expressed in its title, the law is absolutely void; indeed nothing else can be lawfully included in it; if therefore, the object or intention of the law-giver is not made clear by the other parts of the Act; it must be determined with absolute certainty by a reference to its title. LEA, J., dissenting. *Ibid.*

9. The object of the statute in question is *expressed in its title;* that title is "an Act *creating* a Record of Mortgages for the parish of Orleans." The statute created anew the office of Recorder of Mortgages, and authorized the appointment of a new office. LEA, J., dissenting. *Ibid.*

REDHIBITION.

1. Action of redhibition may be prosecuted against an absent defendant by attachment, where the plaintiff alleges that she made a tender of the slaves, and demanded a rescission. In such a proceeding the defendant is properly represented by a curator *ad hoc*, and service of citation is regularly made by posting on the door of the court house. *McCall* v. *Henderson*, 209.

2. *By the Court:* The third objection is, that the person signing the attachment bond was not authorized to sign the same. We agree with the defendants' counsel that the filing of a power of attorney under private signature, at the trial of the exception, is not proof of its existence at the suing out of the attachment, though it purports to bear the same date. But we find that the party signing the bond was examined as a witness. The objection and testimony seem to have been submitted to the jury, and we cannot say they erred in their conclusion. *Ibid.*

3. Suit to rescind sale of slaves. Judgment for plaintiffs and damages allowed. *Dixon* v. *Chadwick*, 215.

4. Want of tender under the circumstances of this case, is a fatal obstacle to plaintiffs' recovery. SPOFFORD, J., dissenting. *Ibid.*

5. The well established rule requiring a tender where the tender is not impossible, nor even inconvenient, results from the general doctrine of commutative contracts, and affords a salutary check against fraud, concealment, and the after thoughts of self-interest. The vendor, warned in time, may take back his property and by attention save it. The ven-

REDHIBITION (*Continued.*)

dee, who, having discovered a redhibitory defect, neglects to notify the vendor by an offer to restore the thing, seems to take the risk of its perishing from that cause upon himself. SPOFFORD, J., dissenting. *Ibid.*

6. A disease, to be the basis of a redhibitory action, must be such as would have baffled the efforts of regular medical aid promptly administered. *McLellan et al.* v. *Williams*, 721.

7. When it was not ascertained of what disease the slave died, or what was the cause of his death, and he received no medical treatment, it is impossible to say that he died of an incurable disease. *Ibid.*

8. The vendor does not take the risk of the service in which the slave may be employed. He does not warrant that the slave will not be attacked by disease within the time limited, nor that the slave will resist the disease without the aid of medicine or of medical art. He does warrant against the existence of any incurable disease, but until a sufficient test of incurability is supplied by the vendee, his warranty is not broken. *Ibid.*

9. Plaintiff sued for the rescission of the sale of a slave, and for restitution of the price paid the defendant, on the ground that the slave was afflicted with a redhibitory disease, to wit, fits. The slave was tendered to the defendants, and disappeared the following morning, and could not be found. *Held:* The rule embodied in Art. 2511 C. C. is but the embodiment in the Code of the maxim *res perit domino*. Until the thing is shown to have perished, the presumption exists that it may be recovered, and that there is still a property in the thing which may be divested by the rescission. *Nixon* v. *Boseman et al.*, 750.

10. There is no force in the objection, that because plaintiffs has alleged one ground of redhibition, he shall not be permitted to show his inability to deliver the slave to the defendant, on account of defects, in the nature of a second ground of redhibition. By the force of the judgment rescinding the sale, the property in the slave, wheresoever he may be, is in the defendant. *Ibid.*

REGISTRY.

1. Where the affidavit of the subscribing witness, upon which the act under private signature was admitted to record, stated that the affiant was present when the act was executed, and saw the parties sign the same, it was a substantial compliance with Art. 2250 C. C. It is the recording of the title in the proper office which is notice to third parties, and not the testimony upon which the instrument was admitted to record. *Boykin* v. *Wright*, 531.

RES JUDICATA.

1. The judgment against the principal debtor has not the force and effect of the thing adjudged against the surety. It is *prima facie* evidence against him, but the surety is at liberty to show errors and mistakes in the judgment, as well as to show that it was obtained by fraud. *Fuselier* v. *Rabineau*, 393.

RES JUDICATA (*Continued.*)

2. A judgment homologating an administrator's account and discharging the administrator, rendered upon publications made pursuant to Art. 1172 of the C. C., is not *res judicata* as to the heirs. The form of notice prescribed by that Article is meant merely for creditors. The heirs should have been cited. *Truxillo v. Truxillo*, 412.

3. Parties to a judgment homologating a tableau of distribution cannot sustain an action against one who was also a party, to recover the amount decreed to him as legatee, on account of his incapacity to receive the legacy. *Girod* v. *Crossman*, 497.

4. A judgment confessed by the president of the police jury, is *res adjudicata* against each individual tax payer.

Parker et al. v. *Scogin et al.*, 629.

See INJUNCTION—*Mock* v. *Garthwaite*, 287.

RESPITE.

1. The right to require security, conferred by Article 3060 of the Code on the creditor, who has not consented to the respite applied for by his debtor, etc., appears to be absolute, and the creditor is not limited to a period of time beyond which he is debarred from its exercise.

Hufty v. *His Creditors*, 26.

2. Where a debtor applies for a respite, and any of his creditors make opposition, and he is required to give security under Article 3060 of the Code, the opposing creditors must be made the obligees in the bond, and the bond should be for a sum sufficient to satisfy their claims.

Nichols v. *His Creditors*, 38.

3. An opposition to the proceedings of creditors granting a respite is not too late, if the proceedings have not been homologated, although ten days may have elapsed since they were regularly filed in court.

Nichols v. *His Creditors*, 447.

REVOCATORY ACTION.

1. Articles 1698 *et seq.* of the Code have no application to cases of mere simulation. They refer only to the mode of avoiding a real contract in fraud of creditors—that is, to the revocatory action proper.

Lucas v. *D'Aimond*, 168.

2. Article 1972 of the Code applies only to the revocatory action, and not to the action *en déclaration de simulation.* It is where the contract is serious, though fraudulent, that the decree must avoid it only as to the complaining creditor, and subjects the property to the payment of the plaintiff's debt, unless the vendee chooses to satisfy it himself. But where there is no contract the property may be declared to belong to the pretended vendor; and if the vendor be dead, it should be inventoried as the property of his succession. *Ibid.*

SALE.

1. An adjudication made by an auctioneer not in accordance with the instructions of the owner is null and void, both as to the owner and purchaser, the latter, however, being entitled to his recourse against the auctioneer.

Bodin v. *McCloskey*, 46.

SALE (*Continued.*)

2. The laws requiring transfers of immovables to be in writing, would be vain and illusory, if the thing sold were not required to be described in writing. In forced sales, especially, it is necessary for the description to be such as to warn the public what is intended to be sold; that the purchaser may be able to identify the object of his purchase, and that the property of the original owner may not be sacrificed by a sale in the dark.

Dodeman v. *Barrow*, 87.

3. The adjudication by the State Treasurer of "six arpents, more or less, in the parish of Assumption," unaccompanied by a delivery of possession, did not convey a legal title to the specific land claimed in this action.

Ibid.

4. The monition law cannot cure such a substantial defect as this. *Ibid.*

5. In a sale it is essential that the price should be certain, that is to say, fixed and determined between the parties, either by themselves, or by the intervention of a third person; otherwise there exists no sale.

Wise v. *Guthrie*, 91.

6. A cotton plantation was sold, subject to an unexpired lease. Before the lease expired, the cotton gin was burnt. *Held:* that the vendor was not liable for the deterioration in the value of the plantation caused by the fire, which was the result of the carelessnesss and negligence of the lessee. The lessee was not the mandatary of the vendor. He was a third person, who had rights which neither the vendor nor vendee could disturb.

King v. *Hall*, 95.

7. The pendency of a suit by a third person for the land, however unfounded it may be, perhaps justifies the purchaser, according to the letter of Article 2535 of the Code, in requiring security from the holder of the note given for the land, which, by the terms of the instrument, is subject to all the equities between the original parties. *Fellows & Co.* v. *Carson*, 121.

8. In all cases where the thing sold remains in possession of the seller, it is to be presumed that the sale is simulated; and with respect to third persons, the parties are bound to show its verity. C. C., 2456.

Griffith v. *Frellsen & Co.*, 163.

9. It is where the purchaser is evicted on the ground that the thing adjudged to him belongs to another person than the party in whose hands it was taken, that he is left to his recourse for reimbursement against the seized debtor and seizing creditor. But where the seized debtor himself seeks to rescind the sale on account of informality, equity requires that he should make the *bona fide* purchaser whole before he evicts him.

Webb v. *Coons*, 252.

10. In a suit to rescind the sale of a slave, it is no defence that a tender has not been made, where the tender is impossible. *George* v. *Greenwood*, 299.

11. A vendee has no claim against his vendor for the reimbursement of expenses incurred in defending a title which was set aside for fraud, of which the vendee not only had knowledge, but in which he participated.

Girod v *Pargoud*, 329.

12. Defendant, the highest bidder at an auction sale of property belonging to the succession, refused to comply with the terms of adjudication. Th

SALE (*Continued.*)

property was regularly resold, and there was a loss. This suit was brought for the difference of price between the first and second sale. *By the Court:* The petition states that the property was adjudicated to *Robert Howes* at the first auction sale for the sum of five thousand dollars, *all of which will more fully appear by reference to the proces verbal of sale, hereto annexed for greater certainty.* But the *proces verbal* states that the property was adjudicated to *Robert Howes for the minor children of John Foulkes*, and this is confirmed by the evidence of the auctioneer, who produced on the trial the card handed to him at the time of adjudication with the name of the purchaser written on it, as follows: "*Tutor Robert Howes*, for minor children of *John Foulks.*" This is a variation between the *allegata* and *probata*, which in so rigorous a proceeding as that upon a *folle enchère*, is fatal to the action. *Foulks* v. *Howes*, 448.

13. In order to extend the operation of Article 2593 of the Code, to the granting of damages against the party who has made the bid in the name of another, there should be bad faith on the part of the bidder, or at least a want of that care which a good father of family would have used. *Ibid.*

14. The Supreme Court having decided both ways as to the rights of the defendant to make a bid for the minors without the previous consent of a family meeting, it seems unreasonable to hold the defendant liable for error of law as to his right so to bid. *Ibid.*

15. It having been irrevocably determined that the *folle enchère* was valid, it follows, as an irresistible sequence of that judgment, that defendant is liable under Articles 2589 and 2593 of the Code. SPOFFORD, J., dissenting, with whom concurred LEA, J. *Ibid.*

16. There is no fatal discrepancy between the *allegata* and *probata*. The *proces verbal* itself was annexed to the petition, and specially referred to in it for greater certainty. The liability of defendant is personal under Article 3893, for the very reason that he caused the adjudication to be made to him as tutor without sufficient authority to bind the minors. By legal intendment the adjudication was made to him personally. SPOFFORD, J., dissenting, with whome concured LEA, J. *Ibid.*

17. Neither error of law, nor the absence of bad faith can release the defendant and oblige the succession to lose the money. This is not an action in damages for a tort, where malice must be proved although even then, ignorance of the law, however obscure and uncertain it may be, has not been held to constitute an excuse. The substance of this action is to recover the damages, liquidated by the law itself, for the breach of a contract. SPOFFORD, J., dissenting, with whom concurred LEA, J. *Ibid.*

18. L., a member of the firm of S. P. & Co., pledged to B. 300 shares of Union Bank stock. *Pickersgill* obtained judgment against S. P. & Co., and seized and sold the stock. B. bought it by his agent. The agent refused to comply with the terms of adjudication, and gave his written consent to let the Sheriff resell. S. G. & Co. purchased it at the second

sale; but, as the bank refused to transfer the stock, the Sheriff returned the writ, "nothing realized." After the sale, B. filed his third opposition in the suit of *Pickersgill* v. *S. P. & Co.*, claiming the proceeds under his act of pledge. He obtained judgment, which was appealed and affirmed. S. G. & Co. tendered the price of their bid to the Sheriff, and demanded the transfer. B. sued the bank for the dividends, and to have the stock transferred to him. The bank called S. G. & Co. in warranty. *Held:* First. That the letter of B.'s agent consenting to the resale of the stock, was a waiver by him of all objections to the sale, and the adjudication to S. G. & Co. was legal. *Brown* v. *Union Bank*, 543.

19. Second. The stock being so adjudicated, could not be divested from S. G. & Co. without a neglect or refusal to comply with the terms of the sale. The fact that they held the money in their hands while the opposition was pending, could not be construed into such refusal. It was not their fault that the bank refused to transfer the stock to them, and the Sheriff's return of the writ did not affect the title; the *mere act of adjudication* invested the purchasers with title—and the writ having performed its office, its return was a matter of course. *Ibid.*

20. A sale will not be set aside on the ground that it was made in fraud of creditors, by one in insolvent circumstances, where it was made openly, for a fair value, and with the knowledge of several of the creditors, although the sale was of the vendor's entire stock of goods. *Wright & Co.* v. *Hogan et al.*, 563.

21. To authorize a tutor to purchase property for the benefit of the minors under his charge, he must obtain the advice of a family meeting *before the purchase.* And where he bids in property without such advice, the executrix, who caused the property to be sold, is not bound to wait till the tutor convene a family meeting, to approve of his purchase, but on failure of the tutor to comply with his bid, she may at once put up the property again for sale. C. C. 2589. *Succession of Foulkes*, 593.

22. A purchaser who holds an unliquidated demand, secured by a tacit mortgage on property sold at private sale, has no right to withhold the price of his bid and delay the adjudication until his claims can be liquidated by a court. *Ibid.*

23. Construction of a written instrument purporting to transfer title to slaves, executed in Mississippi, contains the following clause: "The condition of the above bill of sale is such that, whereas, the said *Ichabod Kelly* has paid and furnished the said *Vincent Singleton* divers sums of money which, when fully paid by the said *Singleton* to the said *Kelly*, will render this bill of sale null and void; and, provided, further, that should the said *Singleton* die without refunding said *Kelly* said sum of money, then and in that case, the said *Ichabod Kelly*, his heirs or assigns, is hereby and forever exonerated from any further liability for any further sum or sums of money to the said *Vincent B. Singleton*, his heirs or assigns. But that the absolute right and title of said negroes shall fully vest in the said *Ichabod Kelly*, his heirs and assigns forever." *Held:* That it is, to all intents and purposes, an act of sale defeasible

upon the performance of certain acts by the grantor in his lifetime. Even were it to be considered in the nature of a mortgage, it would have conveyed the legal title under the law of the place where the contract was made. And before the mortgagor could have exercised his equity of redemption, he would have been obliged to tender a full discharge of the debt for which the security was given.

Heirs of Singleton v. *Kelly, tutrix*, 647.

34. The instrument is a deed of trust to secure the payment of a sum of money. MERRICK, C. J., dissenting. *Ibid.*

35. Where there is no price there is no sale.

Fort v. *Union Bank of Louisiana*, 708.

36. A purchaser, at a Sheriff's sale, made without a previous seizure, acquires nothing, at least as against a third party in possession.

Williams v. *Clark*, 761.

37. The defendant purchased the land in controversy, at a public sale provoked by him to enforce a mortgage, in his favor, resting on it. The plaintiff, claiming the land by a deed from the mortgagor, which was executed subsequent to the mortgage, but anterior to the public sale to defendant, yet not registered until afterwards, instituted a petitory action and sought to rescind the sale to defendant for various alleged defects and vices. *Held:* That it is doubtful, under the facts of the case, whether plaintiff can inquire into the regularity or good faith of the proceedings under which defendant acquired title. The mortgagor was the proper party to attack the order of seizure and sale by a direct action, and that, conceding plaintiff could impeach defendant's title, he had not laid a foundation for doing so in his petition, having alleged no tender to defendant of the mortgage debt which burdened the land, and which was only discharged by the sale, which he sought to treat as a nullity. *Taylor* v. *Huey 3d et al.*, 614.

See SIMULATION—*Dupuy* v. *Dupont*, 226.
See LEASE, &c—*Bartels* v. *Their Creditors*, 433.

SALE JUDICIAL.

See ESTOPPEL—*Union Bank* v. *Bermudez*, 64.
See MINORS—*Succession of Coleman*, 109.
See LEASE, &c.—*Bartels* v. *Their Creditors*, 433.

SEIZURE AND SALE.

1. An appeal lies from an order of seizure and sale based upon an authentic act importing a confession of judgment. *Mathe* v. *McCrystal*, 4.

2. A note was executed by M. to his own order, and by him endorsed in blank, secured by mortgage in favor of C., *or any holder* of the note. *By the Court:* There was no matter *in pais* to be proved. The execution of the note, its endorsement in blank, and the act of mortgage, importing a confession of judgment in favor of the holder of the note, were all proved by authentic evidence. The exhibition of the note and mortgage by the plaintiff, identified him as the holder, who, by the terms of the contract, was entitled to the order of seizure and sale.

Ibid.

SEIZURE AND SALE (*Continued.*)

3. An authentic act identifying a note with the mortgage to secure it, which recites that B. mortgages &c. to C. and M., *or any holder of said note*, and further shows the note to be endorsed in blank by the payee, will entitle the holder, on this proof alone, to an order of seizure and sale.
Race & Foster v. *Rruen*, 34.

4. The subsequent endorsement of the note in blank by another—which is a matter *in pais*—could not affect plaintiff's right to executory process, as such endorsement could be stricken out—possession of the note being sufficient to identify them as holders and owners. *Ibid.*

SEQUESTRATION.

1. The makers of a note caused it to be sequestered, and prayed for its restitution, &c., on the ground of error and fraud. The sequestration was afterward set aside, and a judgment on the note obtained against them. Pending the litigation, the makers of the note became insolvent, and after execution against them returned *nulla bona*, this suit against the sureties on the sequestration bond was brought. *Held:* Plaintiff could not have maintained an action on the note pending the litigation for its restitution, the sequestration being merely a conservatory act.
Horne v. *Belcher*, 321.

2. The sequestration had the effect not only of suspending the payment of the note, but of placing it beyond the reach of commerce. *Ibid.*

3. Certain slaves were sequestered and bonded by intervenors, on the written consent of plaintiff's counsel that the slaves should be delivered to intervenors, "they having given bond for said negroes as co-administrators, the plaintiff being satisfied that the negroes would be forth-coming at the termination of the suit." A second writ of sequestration was granted for the reasons set forth in the first application and on motion it was dismissed. *Held:* The second sequestration was properly dismissed—because, by the bond on file which the plaintiff approved, the property sequestered had been released, and no additional grounds had been shown to authorize the subsequent seizure of the same property.
Levi v. *Penny*, 539.

See PRINCIPAL AND SURETY—*Clapp* v. *Seibrecht*, 528.

SHERIFF.

1. The fact that the Sheriff's wife has a law suit (to which he is a necessary party) pending before the court for which a jury is to be drawn, does not disqualify or exempt the Sheriff from performing the ministerial duties imposed upon him by the Act "relative to juries," approved March 14, 1855; nor does the fact that he has performed those duties furnish good cause for a challenge to the array by the party opposed to his wife, when a jury thus drawn is called to try her case.
The State v. *Cooley, J.*, 79.

2. The Sheriff was not disqualified to summon the jurors for the term, after they were drawn according to law; nor does the fact that he summoned them furnish ground for challenge to the array. *Ibid.*

SHERIFF (*Continued.*)

2. The Code of Practice, Articles 496-7, made it the duty of the Clerk to draw the names of the jurors from the box, for the trial of a particular cause, and although, by the Act of 27th of April, 1826, this is no longer necessary, it may furnish a guide for the present case. *Ibid.*

4. It would not be becoming in this case for the Sheriff to attend personally upon the jury during their deliberations. *Ibid.*

5. Where there is no qualified Coroner, the Act of 9th March, 1855, section 1st, furnishes a mode by which the vacancy may be speedily filled. *Ibid.*

6. *By the Court:* We would not be supposed to intimate that a cause must be utterly suspended when the Sheriff and Coroner are both disqualified to perform ministerial duties in a particular case. *Ibid.*

7. Damages against Sheriff for failure to return *fi. fa.* within the legal delay. *Brand* v. *Johnson*, 273.

8. The alleged insolvency of defendant in execution, will not excuse the Sheriff from calling on plaintiff to point out property, as required by C. P. 726, 727. *Ibid.*

9. The address for the removal of *Hufty* from the office of Sheriff of the parish of Orleans was presented to the Governor, and approved by him. His official approval and signature consummated the removal. *Bell* v. *Hufty*, 303.

10. Article 97 of the Constitution is in these words: "All civil officers, except the Governor and Judges of the Supreme and inferior Courts, shall be removable by an address of a majority of both Houses, except those the removal of whom has been otherwise provided by this Constitution." Accurately speaking, the Constitution itself nowhere else provides a mode of removing Sheriffs. *Ibid.*

11. Article 89 allows the impeachment and the prosecution of Sheriffs. But the power of impeachment, or prosecution for misdemeanor in office, which, in case of conviction, involves a removal from office as an incident, and the power of removal without impeachment, or prosecution, are concurrent powers, both of which are clearly recognized by the Constitution, and neither of which excludes the other. *Ibid.*

12. The theory of our representative Governments is, that offices are created not for individual emolument, but for the public good. And the object of the Constitution was to provide not only for the punishment of official delinquents, which would involve the dismissal from office, but also a mode of removing civil officers, against whom no accusation of crime could be made, or sustained, whenever the public good should require such removal. *Ibid.*

13. It would be rebellion in a judge to say that a plain and unqualified grant of power, given by the Constitution to a particular department of the Government, was null because he thought it was against common right. *Ibid.*

14. It is hardly tenable to say that a man can have a "vested right" to any public office under our form of government. Certainly it cannot be

SHERIFF *(Continued.)*

said of a Sheriff, when, in the language of the 80th Article of the Constitution, the very tenure of the office is, that he shall hold it "for the term of two years, *unless sooner removed.*" *Ibid.*

15. The power of removing an officer upon address of the two Houses is not a judicial power, but is essentially administrative, and therefore not within the prohibition of Article 2 of the Constitution, which provides that "no one of these departments, [legislative, executive and judiciary] nor any person holding office in any one of them, shall exercise power properly belonging to either of the others." But even if this power of removal did somewhat partake of a judicial character, its exercise would not, on that account, be void, for it is protected by the concluding words of the same Article 2: "No one of these departments, nor any person holding office in one of them, shall exercise power properly belonging to either of the others, *except in the instances hereinafter expressly directed or permitted.*" *Ibid.*

16. The verdict of the jury in favor of *Hufty*, in the contested election between *Bell* and *Hufty*, was not a bar to the removal of *Hufty* by the Legislature. The question before the court was: Shall *Hufty* receive a commission? The question before the Legislature was: Shall *Hufty* be removed from office? In the one case there were two parties, each urging that he could count the greater number of votes in his favor. In the other case there were no parties, but a mere act of administration. The judgment in favor of *Hufty* has been enforced. *Hufty* has been placed in possession of the Sheriffalty. *Ibid.*

17. The reasons assigned in the preamble to the address for the removal of *Hufty*, whatever they may be, cannot vitiate the act of removal, which act was within the constitutional competency of the Legislature, uncontrolled by any superior power. With their reasons, whether good, bad, or indifferent, the judiciary have nothing to do. *Ibid.*

18. While the Legislature has power to remove a Sheriff by address, *proprio motu*, without any accusation preferred by memorial against him, yet Article 97 of the Constitution does not authorize the Legislature to hear evidence upon, and decide judicially, the legality or validity of an election of Sheriff. BUCHANAN, J., dissenting. *Ibid.*

19. Unless the reasons assigned by the Legislature exhibit an unconstitutional exercise of power, they could not be examined judicially. BUCHANAN, J., dissenting. *Ibid.*

20. The exercise of judicial power by the Legislature is unconstitutional, except in the instances expressly directed or permitted in the Constitution. BUCHANAN, J., dissenting. *Ibid.*

21. The identical specifications upon which the relator had contested the election of *Hufty* before a tribunal, the decision of which was final, are the very grounds set forth in the address for the removal of *Hufty*. The address is thus an interference with the legal course of proceedings of the regularly constituted judiciary of the State, and an appellate jurisdiction claimed and exercised by the Legislature. BUCHANAN, J., dissenting. *Ibid.*

SHERIFF (*Continued.*)

22. The obligations of the sureties on the Sheriff's bond, held not to be effected by the erasure of the unmeaning phrase "for a like sum," nor by the interlineation of the names of the last two sureties.
The State v. *Dunn*, 549.

23. The date of such instrument not being of the essence of it, a change of the date, so as to correspond with the date of its acceptance by the parish officers, could not invalidate it. *Ibid.*

24. The sureties on such bond may recede before they have been accepted, and until they give notice of their wish to recede, they may be accepted. After an acceptance the contract was perfect, and no party could retract. *Ibid.*

25. The addition of two other sureties separately bound, could not affect the liability of the first eight, who continued to be severally bound, each for the sum and upon the conditions he had specified, and no others. *Ibid.*

26. Where a Sheriff, by failure to give bond as Sheriff within the time prescribed by law, had thereby forfeited his capacity as Tax Collector, and afterwards he executes a bond as Sheriff with sureties and is made Collector of Taxes by appointment of the Recorder of the parish—*Held:* That the sureties were bound to know that he had forfeited his right as Tax Collector at the time of the execution of his bond, and that he could only be restored by the Recorder's appointment, and were not therefore discharged. *Ibid.*

27. A defaulting Sheriff may be appointed Tax Collector after exhibiting a discharge from the proper officer of the State. *Ibid.*

28. Sureties on a Sheriff's bond cannot be permitted to plead ignorance of a defalcation of the Sheriff at the time they signed the bond. The records of the Auditor's and Treasurer's office are open to the public, and they might have inquired into the state of his account. It was not the duty of the Auditor and Treasurer, who were neither parties nor privies to the bond, to hunt up the sureties and serve them with a copy of the Sheriff's account. *Ibid.*

29. In this contract with the sureties there was no warranty by the State that the Sheriff was not a defaulter; and an act of the Legislature extending to the Sheriff time of payment, is no fraud on the sureties, who only guaranty his future fidelity. Code, 3006. *Ibid.*

30. The objection that a Sheriff's bond was not executed until more than thirty days after the Sheriff's commission, and that it was not approved until some months after, and that it was not recorded by the Recorder in the separate book kept for its registry, but there being no such book, that it was recorded in another book, cannot avail the sureties in seeking to avoid liability. *State* v. *Bradly, Administrator, et al.*, 643.

31. The amount of taxes, which it is shown could not have been collected, will be allowed as a credit to an action against the sureties on a Sheriff's bond. *Ibid.*

32. Money deposited by a Sheriff in his official cacity is not liable to seizure in execution at the suit of his individual creditors.
Folger v. *Marigny et als.*, 727.

SHIPS AND SHIPPING.

1. In steamboat navigation on our rivers, where the trip, as from St. Louis to this city, is made in seven or eight days, and sometimes less, the owner of a boat would not be justified, even where there were warehouses, to detain a cargo a month or six weeks in order to make the necessary repairs, and continue the voyage.

Roe v. *Crescent Insurance Company*, 408.

2. As between the shipper and the master, the legal presumption arises from the bill of lading, that the goods were in good condition, but such presumption cannot affect third persons.

Brousseau v. *Ship Hudson*, 427

3. When a person receives a shipment of cotton, and gives a bill of lading in the ordinary form, he becomes liable as a common carrier.

Lengsfield v. *Jones*, 624.

4. The fact that plaintiff inspected the boats before the shipment does not exempt the carrier from liability for a loss occasioned by the unseaworthyness of the vessel. *Ibid.*

5. Ships and vessels are classed, by Art. 3256 C. C., among the objects susceptible of mortgage, but this is modified by Art. 3272, which declares that hypothecations of ships and other vessels are made according to the laws and usages of commerce. *Wickham* v. *Levistones*, 702.

6. The only privilege which exists on vessels, are those which are expressly recognized and enumerated in the Code, Art. 3152. The extreme term of the duration of privileges on steamers, when engaged in making voyages between this port and those of other States, is sixty days. *Ibid.*

7. Where the owner of a vessel makes a contract, by which he stipulates, in consideration of advances to be made by the other party, to give him the entire management and control of the vessel, with the right and authority to employ all the officers and crew necessary to navigate it, and to hold the vessel as security until the reimbursement of the whole amount of said advances, &c. *Held:* That such a contract cannot be construed as having the effect of a pledge on the vessel, nor can it be looked upon as creating a privilege on the vessel or its proceeds. Such a claim not being recognized as a privilege in Art. 3204 C. C. *Ibid.*

SIMULATION.

1. A simulated sale made by a father to a daughter and her husband, which is really a donation in disguise to the daughter, is without any more effect than if made to the daughter alone. *Dupuy* v. *Dupont*, 226.

2. The rule that simulated contracts of a father when attacked by his forced heirs are only to be set aside in so far as they impair the *légitime* of the heirs, does not seem to apply to the case of a simulated sale of land or slaves to a favorite child. Code 2419, 1305-6-7-8-9-10, 1326, 1488. *Ibid.*

3. The action *en declaration de simulation* may be instituted by the parties to the act, and their heirs and legal representatives, as well as by third persons, with this distinction, however, that the latter are allowed to have recourse to parol evidence to contradict the authentic act, whilst the for-

SIMULATION (*Continued.*)

mer are precluded from the exercise of this right. (VOORHIES, J., with whom concurred BUCHANAN, J., dissenting.) *Ibid.*

4. Heirs, except when suing to recover their *légitime*, stand in the same situation and enjoy the same and no other rights than those which were held by their ancestor. But when they sue for the recovery of their *légitime* they are considered as third persons, or creditors. This difference is the result of the recognized distinction between the general rights of heirs and their rights to the *légitime*, the one being derived from the ancestor, and the other from the law. (VOORHIES, J., with whom concurred BUCHANAN, J., dissenting.) *Ibid.*

5. The presumption of simulation established by Article 2456 of the Code is inoperative with respect to the parties to the act, and therefore to the heirs, in a case where the heirs derive their rights from the ancestor, a party to the act. (VOORHIES, J., with whom concurred BUCHANAN, J., dissenting.) *bid.*

6. An *indirect* donation is based upon a real contract, and is an advantage conferred upon the other contracting party under color of a real contract for the whole, whilst a *disguised* donation, whether it assumes the form of a direct sale to the party to be benefited, or of a sale to an interposed person, is wholly a simulation. The *indirect* donation is, therefore, a real contract, with the exception of the advantage indirectly conferred; but the *disguised* donation is a simulated contract. (VOORHIES, J., with whom concurred BUCHANAN, J., dissenting.) *Ibid.*

7. The indirect, or disguised donation, clothed with the form of a sale, if made to a stranger, would be good as a donation, if there were no prejudice to the *légitime*, but should the *légitime* be impaired, it would be subject to reduction. When such an advantage is conferred upon a co-heir, it is not only subject to reduction, but, in the cases pointed out by law, may be liable to collation. Where, however, such advantages are conferred upon incapable persons by a disguised donation, they are absolutely null, while by an indirect donation, they are simply reducible. (VOORHIES, J., with whom concurred BUCHANAN, J., dissenting.) *Ibid.*

8. The allegation in plaintiff's petition, that the husband is an interposed person for the benefit of his wife, does not deserve serious consideration, because the act of sale was passed to both husband and wife. (VOORHIES, J. with whom concurred BUCHANAN, J., dissenting.) *Ibid.*

9. At the date of the sale to the death of the vendor the parties lived in the same house, from which it must be inferred that delivery accompanied the act of sale, for it is well settled, that where a vendor and vendee live in the same house, possession follows title. (VOORHIES, J., with whom concurred BUCHANAN, J., dissenting.) *Ibid.*

10. The relationship between the parties does not of itself constitute a badge of fraud or simulation. (VOORHIES, J., with whom concurred BUCHANAN. J., dissenting) *I bid.*

11. A suit to set aside a conveyance from the husband to the wife, on the ground of fraud and simulation, is not a revocatory action, but in effect an action *en declaration de simulation.* *Dunn* v. *Woodward*, 265

See *Carson* v. *Johnson*, 757.

SLAVES AND SLAVERY.

1. The emancipation of a slave by last will only takes effect after the formalities prescribed by Article 187 of the Code have been fulfilled; that is to say, after a declaration shall have been made to a competent court; after that declaration shall have been advertised; and after the oppositions, if any be made, shall be determined. The declaration of intention to emancipate is to be made by the executor, or by the heir of the testator. Buchanan and Voorhies, JJ., and Merrick C. J.

Henriette v. *Barnes*, 453.

2. Since the statute of 1846 a slave taken from Louisiana to California does not thereby acquire freedom. Buchanan and Voorhies, JJ., and Merrick, C. J. *Ibid.*

3. A slave carried from Louisiana to California by her master, though she there acquires the status of a free person, cannot stand in judgment in this State, except in a suit for freedom. Spofford, Voorhies and Lea JJ., and Merrick, C. J. *Ibid.*

4. If the court were to decree to the plaintiff, now in California, the legacies bequeathed to her, her freedom would be recognized, which would be final between the parties to this suit. What then would prevent her return to Louisiana? What force would there be in the Act of 1846, after her freedom had been recognized by the court? Merrick, C. J., and Voorhies, J. *Ibid.*

5. Under Article 3510 of the Code, a slave may acquire freedom by prescription. *Eulalie* v. *Long*, 463.

6. Article 3510 of the Code was not intended to introduce a mode of emancipating slaves, or of changing their *status*. It treats of a slave as being still a slave after the ten years enjoyment of his freedom. But it prohibits the master from restraining him. The public have an overruling interest in the question of his *status*; and the laws by which the manumission of slaves has always been so sedulously guarded from abuse, are all in vain, if the State can be compelled to recognize as unconditionally free, with liberty to remain in the State, and without regard to age, character, and other legal qualifications, all such slaves as their masters may choose to turn loose for the space of ten years. Spofford, J., with whom concurred Lea, J. *Ibid.*

7. Colored persons, until they are recognized as free, or until they are emancipated, cannot maintain a suit for wages. It would be otherwise in the case of a free person illegally reduced to a condition of slavery.

Maranthe, Genie et al. v. *Hunter et al*, 734.

8. Decision in the case of the *State* v. *Harrison*, a slave, 11th An., respecting the constitutionality of the Act of 1855, relative to slaves and free colored persons, affirmed. *Ibid.*

9 An obligation to emancipate a slave twenty-five years hence, and to take all legal steps, and to incur all necessary charges incident to such emancipation, has reference, not to such legislation as was in force at the date of the contract, but to such as might be in force when the contract is to be carried into execution. *Ibid.*

See Mortgages—*Solibellas* v. *Consolidated Association*, 682.
See Wills—*Heirs of Henderson* v. *Rost*, 541.
State v. *Harrison*, 729

STATUTES.

1. Statutes in derogation of common right should not be enlarged by construction. *Duchamp* v. *Butterly*, 67.

2. So much of the Act of 20th February, 1817, as upon a verdict of fraud against an insolvent, disqualifies him from holding any office of trust or profit under the government of this State, is repealed by the Act of 1855. *Stafford* v. *His Creditors*, 470.

3. In *Holmes* v. *Wiltz*, ante p. 439, it was held that the repealing clause appended to the revisory Acts of 1855 did not repeal such pre-existing statutory provisions as were re-enacted by the revisory statute. *Ibid.*

STREETS.

1. The owner of property and others interested will not be considered as having notice of the proceedings of the commissioners of estimate and assessment after the expiration of the delay fixed by the court for filing their report; and where the report was afterward filed and homologated, it will not bind them. *New Orleans, praying for the opening of Dryades street*, 458.

SUBROGATION.

1. Article 2156 of the Code requires that in conventional subrogations an actual subrogation *should be expressed and made at the same time as the payment.* It cannot be made in anticipation of the payment, for the payment is the essential basis of the subrogation. *Succession of Wilson*, 294.

2. Nor can a subrogation be validly made *after* the payment. *Ibid.*

3. *Facts:*—Not creating legal subrogation. *Fort* v. *Union Bank of Louisiana*, 708.

4. A third person, not bound for a debt, who pays it in discharge of the debtor, and receives at the time from the creditor a subrogation to his rights, can receive from the debtor only the amount so paid to the creditor. *Aliter*, if the transfers from the creditor were made in virtue of a sale or donation. *Roman* v. *Forstall*, 717.

SUBSTITUTIONS.

1. Testamentary disposition in the following words: "I give to my great grandchildren—*Kitty's* children and *Lucy's*, if she has any—all the balance of my property of all kinds; but be it known and understood, that *Elvira*, my daughter, is to have the care and management of it during her life in this world, and her and *Stewart* is to take possession of it and carry it on, and have the proceeds, if there be any, but shall not be bound to give a bond or security for anything. If *Elvira* and *Stewart* should die before *Kitty* and *Lucy*, then the property to fall into their hands to be carried on in the same way, and the proceeds to go to them. The property is not to be sold, but to be kept together until the heirs come of age; but as they come of age, they shall be entitled to share with their parents." *Held:* There is no prohibited substitution in such a disposition. The great grandchildren are the instituted heirs. They are certainly not charged with the return of the testator's estate to any third

SUBSTITUTIONS (*Continued.*)

person, nor to preserve it for any third person. The testator clearly expresses his intention that the property which he bequeathes to his great grandchildren should be kept together, and that there should be no partition of it until the heirs come of age. This disposition is expressly sanctioned by Article 1224 of the Civil Code.

McCalop v. *Stewart*, 106.

2. The dispositions in favor of the testator's daughter and her husband, and in favor of his granddaughters, the mothers of the instituted heirs, are not substitutions, but are usufructs within the purview of Article 1509 of the Code. *Ibid.*

SUCCESSION.

1. A surviving wife is called to the inheritance before the natural brothers or sisters. *Duplessis* v. *Young*, 120.

2. On the trial of an application for letters of administration, it is competent for the opponent to show that she was publicly acknowledged and held out to the world as the wife of the deceased; that all the property belonging to the succession was community property; that the opponent was ready to give security for the payment of all the debts of the succession, and that the creditors were willing to accept such security.

Succession v. *Pratt*, 201.

3. It would be competent for the court to protect the heirs by requiring the opponent, as pre-requisite to the exercise of her rights as usufructuary of the community property, either to advance a sufficient sum to pay the debts of the deceased, or produce the consent of the creditors to her assumption of the debts, and to her furnishing security for their payment; and such assumption should be accompanied by a release of the heirs from all liability. *Ibid.*

4. If the heirs of full age, the estate being solvent, and no separation of goods applied for, have so far accepted the succession, purely as to release its debts, the subsequent appointment of an administrator cannot revive them.

Stratton v. *Rogers*, 380.

5. The delivery of the effects of a deceased passenger to the agent of the administrator appointed in Massachusetts, before the appointment of a curator here, will discharge the master. *Walker* v. *Goslee*, 389.

6. Plaintiffs, heirs of A., in an action against his administrator to recover their shares of the succession, in their petition declare their heirship to be derived through their ancestor B., a predeceased brother of A., and, in the same connection style themselves "*heirs*" of B. *Held:* That under Art. 982 of the C. C. this was equivalent to an express acceptance of the succession of B., though that succession was not the subject matter of the litigation. *Truxillo* v. *Truxillo*, 412.

7. Representation is a legal fiction, the effect of which is to put the representative in the place, degree and rights of the party represented. It is true, a person may represent one whose succession he has renounced; but that is not the case of plaintiffs, *who declare in their petition, that they are the heirs of the party whom they represent.* *Ibid.*

8. A petition is a judicial proceeding in the sense of Article 932 of the Code. *Ibid.*

SUCCESSION (*Continued.*)

9. Plaintiffs claim nothing in the succession of B. They refer to him merely to show, that through him, they are entitled to inherit from his brother A. It is with respect to the succession of the latter only that they assume the quality of heir, in the manner intended by Art. 982 C. C. SPOFFORD, J. with whome concurred LEA, J., dissenting. *Ibid.*

10. This article was taken from Art. 778 of the Code Napoleon, the commentators upon which generally recognize the distinction upon which this case should turn, a distinction pointedly made in *Anderson* v. *Cox*, 6 An. 13. SPOFFORD, J., with whom concurred LEA, J., dissenting. *Ibid.*

12. The intervenors S. O. and E. G. St. H,. having, by the evidence adduced, to show there maternal descent, shown also their paternal origin, it was competent for the other parties in interest to show that the connection, of which the intervenors thus declared themselves the offspring, was an adulterous connection. *Succession of Peyran*, 694.

12. The avowed father having been, at the time of the conception of said intervenors, the husband of another woman and not of their mother, they fall within the prohibition of 914 C. C., and their claim to the succession of their mother was rightfully repelled. C. C. 201. *Ibid.*

See HEIR—*Fletcher* v. *Decoudreau*, 59.

See RES JUDICATA—*Truxillo* v. *Truxillo*, 412.

SUPERSEDEAS.

1. To entitle a party to the extraordinary remedy of a supersedeas to stay a writ of possession, issued from the District Court on a judgment of this court, he should show affirmatively that the writ of possession issued in contravention of the terms of the decree of this court.
Crane v. *Allen*, 493.

SUPREME COURT.

1. Commissions allowed to a provisional syndic, and not opposed in the District Court, cannot be assigned as error in the Supreme Court.
Matthews & Finley v. *Their Creditors*, 36.

2. It is too late, on an application for a re-hearing, to take advantage of the neglect of appellant to file his brief within two days after the cause was set for trial. The appellee should have moved for a continuance when the cause was called for argument. *Whitehead* v. *Tulane*, 302.

3. An amendment to the judgment of the lower court, by embracing within it the name of one of the opponents, accidentally omitted, is irregular. But if the record contains evidence which shows that judgment in the same form should be immediately pronounced, the decree will be affirmed by the Supreme Court. *Whipple* v. *Hertzberger*, 475.

4. The action of the District Court relative to the granting of new trials, in criminal causes, cannot be reviewed by the Supreme Court, unless brought before it in such a mode as to present for solution an unmixed question of law. *State* v. *Bass*, 478.

5. The Supreme Court has no jurisdiction over the conclusions of the lower court on the mixed questions of law and fact raised by an affidavit for a continuance in a criminal case. *State* v. *Kennedy*, 479.

SUPREME COURT (*Continued.*)

6. The Supreme Court, as a court of error, or an appellate court, for the consideration of questions of law only, is without authority to reverse the judgment of the lower court in a criminal case, except upon a clear showing that there has been error committed in the proceedings of the lower court, and that the appellant has been prejudiced by it *Ibid.*

7. The jurisdiction of the Supreme Court in cases of appeal attaches on the filing of the bond of appeal, and the inferior court thereafter has no authority to take any steps in such cases, except such as are necessary to transmit the record. An order by the inferior court granting an extension of time to prosecute the appeal, is a mere nullity.

State v. *Judge of the Fifth Dist. Court of N. O.* 728.

See CRIMINAL LAW—*State* v. *Johnson*, 422.
State v. *Kennedy*, 479.

SURETY.

1. A judgment had been obtained by plaintiff against J. T., with privilege on the interest of J. T. in certain goods belonging to the firm of J. T. & Co., which had been attached, and were bonded by J. T. & Co., who had intervened and claimed the goods. J. T. & Co. obtained a judgment recognizing their right to the goods, "subject to the payment of such sum of money as may be shown to be the value of the interest of defendant (J. T.) therein." In an action against the surety, on the bond of J. T. & Co. *Held:* that no judgment could be rendered until the amount of the interest of defendant, J. T., in the property attached was shown. *Fraser & Co.* v. *Thorpe*, 47.

2. Sureties have an equitable interest in the payment of the principal demand, and a judgment creditor has a right to permit an execution to issue at their instance. *Fluker* v. *Bobo*, 609.

See SHERIFF—*State* v. *Dunn*, 549.
State v. *Bradley*, 648.

SURRENDER.

1. Under proceedings had for a forced surrender, in which there was no prayer for imprisonment, the jury found a verdict of guilty, but the court refused to sentence the defendant to imprisonment. *Held:* that the Court did not err; the prayer for general relief, while it entitles the party to all the ordinary decrees or orders which the pleadings may justify, will not authorize the imprisonment of a debtor under a highly penal statute. *Leland & Co.* v. *Rose*, 69.

2. Plaintiffs sued for certain batture property, alleged to belong to the succession of their father. Defendants averred that the father had surrendered the property to his creditors in 1809. *By the Court:* The surrender no doubt gave his syndic the right to sell, but the title still remained in *Remy*. Old Code, page 294, Art. 17.

Remy v. *Municipality No.* 2, 148.

3. The property was never sold. The creditors received very nearly the full amount of their claims. As no creditor asserts any claim against the succession, and as *Remy* died (in 1821) in possession of the property, it is fair to conclude that his creditors were satisfied, if not paid in full.

Ibid.

SYNDIC.

See Surrender.

See Executor and Administrator—*Succession of Pasquier*, 279.

TAXES AND TAX COLLECTORS.

1. Judgment for municipal taxes by default and confirmed, without proof that the property assessed in the name of the defendant belonged to him; *Held:* a legal presumption necessarily arises from the provisions of the assessment law, and it was the business of defendant to show the error in the roll, if error there was. *New Orleans* v. *Gottschalk*, 69.

2. Any neglect of duty on the part of the assessors, involving a want of ordinary care and diligence in the discharge of their duties, occasioning damage, would give rise to an action on the part of the State or the city against them to repair the loss occasioned by such neglect. Or the damage arising from such neglect may be set up by way of defence against the amount due the assessors.

Kathman v. *New Orleans*, 146.

3. In assessing property the title papers are not required to be produced to the Assessor when he makes the assessment; and the defendant should be permitted, in order to show omissions by the Assessors, to prove, by parol evidence, that certain individuals possessed real estate and had not been assessed. *Ibid.*

4. The law does not require absolute perfection in the assessment, as this in a large city like New Orleans would be impossible. The assessors are only held to use due diligence and care in ascertaining the property subject to taxation, and the names of the persons to whom it is to be assessed. *Ibid.*

5. The sum allowed by law to the assessors from the city is the amount due by the State; and if the Auditor has made an error in his calculation, it cannot prejudice the city. *Ibid.*

6. Although the assessment roll may be considered as not having the force and effect of a final judgment, yet a party will not be permitted in all cases to go behind it. On the contrary, he should not be permitted so to do, unless it be shown that the party had sought in vain, or was prevented by some valid cause from seeking the correction of the assessment roll in the manner pointed out by law.

New Orleans v. *Rousseau*, 195.

7. The deed of the Tax Collector can have no effect without the production of the assessment roll which stands in the place of a judgment.

Bonvous v. *Brown*, 214.

8. Although the Act of the Legislature has not declared that the delivery of the tax roll should have the force and effect of a final judgment, yet a party who has not made an effort to have the errors corrected, in the manner indicated by the Act, and seeks to go behind the assessment roll, should show some valid reason why he did not make an attempt to have it corrected while it was subject to correction; and, moreover, not only show that there has been an error made to his prejudice, but also show the precise amount he is entitled to have deducted on account of such error. *New Orleans* v. *Lesseps*, 251.

TAXES AND TAX COLLECTORS (*Continued.*)

9. Defendant was sued for the cost of a license for keeping a beer house, &c. He pleaded that he was protected by the statute which provides that "it shall not be lawful for any municipal corporation within this State, to levy any tax on persons engaged in selling articles of their own manufacture, manufactured within this State." *By the Court:* The evidence shows that the appellant keeps a beer saloon, in which he retails, by the glass, beer of his own manufacture. His manufactory and saloon are both situated on the same lot. It appears to us that the immediate sale of beer from a manufactury, and the retail of it in a public saloon, form distinct branches of business, trade or occupation. We do not think it was the intention of the law-maker to exempt from taxation such articles thus retailed to carry on a public saloon. Hence, we conclude that the appellant, as keeper of a beer-house or saloon, does not fall within the exemption of the statute.

New Orleans v. *Guth*, 405.

10. The Legislature, by the Act of 11th of March, 1854, p. 46, intended, in fixing the compensation of the Assessors, to include, under the term property, the capital which it was the duty of the Assessors to ascertain.

Kathman v. *New Orleans*, 457.

11. The term property, in its enlarged signification, includes capital.

Ibid.

12. The Parish Tax Collector is the proper person to collect the tax levied to pay the subscription of stock of a railroad company.

Parker v. *Scogin et al.* 629.

13. The 59th section of an ordinance of the Common Council of New Orleans, approved December 29th, 1855, which declares that "every manufacturer of cordials or syrups," shall be taxed "seventy-five dollars," is null and void, being in violation of a prohibitory law of the State. The Act of April 25th, 1853, p. 135, reënacted in the revisory statute of March 15th, 1855, section 3d, p. 326, having declared "that it shall not be lawful, hereafter, for any municipal corporation within this State, to levy any tax on persons engaged in selling articles of their own manufacture, manufactured within this State."

New Orleans v. *Mascaro*, 733.

14. This statutory prohibition is not repealed, so far as the city of New Orleans is concerned, by the Act of 20th of March, 1856, entitled "an Act to consolidate the city of New Orleans," &c., p. 136, and even were it so, the repeal could not give vitality to an ordinance which was void *ab initio.* *Ibid.*

15. The exemptions specified in the Act of 1856, as exclusive, are confined to taxes upon property; sec. 36. The subject of exemption from taxation upon particular callings, is left where it stood before. The repealing clause in the Act of 20th of March, 1856, leaves the 3d section of the Act of March 15th, 1855, "relative to municipal corporations," in full force. *Ibid.*

16. The Police Jury aforesaid, by an ordinance adopted 29th December, 1855, imposed a yearly tax "on each and every person keeping a dairy within

TAXES AND TAX COLLECTORS (*Continued.*)

the limits comprised within the upper line of this parish and Verret Avenue, a yearly tax of two dollars for each and every cow," &c. Under the Act of March 15th, 1855, p. 395, the said Police Jury may impose a tax "on all persons pursuing any occupation, trade or profession," and, therefore, may impose a tax on dairymen. But the tax must be levied on *all* dairymen. The ordinance in question, while professing to tax the occupation, really imposes a tax upon cows kept by dairymen within certain limits. Considered in that light, it is equally inconsistent with a just interpretation of the statute which conferred the power of taxation on said plaintiffs. It is not a tax on personal property to be preceded by an assessment, nor even on all cows within their jurisdiction. This is not only repugnant to the principles of equality which govern the exercise of the taxing power by the State, but was, evidently, not within the scope of the authority conferred by legislation on the said Police Jury. *Police Jury of the Parish of Orleans* v. *Nougues*, 739.

17. The 5th section of the general Act "relative to Police Juries," approved 9th April, 1847, (see Sess. Acts, p. 82,) was not repealed *quoad* said Police Jury by the aforesaid Act of 1855. *Ibid.*

18. This suit was brought to recover the amount of certain drafts, drawn by the captains of certain schooners, for the inspection, at sundry times, of said vessels at the Rigolets, the Atchafalaya and the Mississippi river, during the time the quarantine regulations were enforced in the year 1855. The defence rests on the ground that the Act of March, 1855, p. 47, did not contemplate the payment of fees for the inspection of vessels at the Rigolets and the Atchafalaya river; that the Board of Health were only authorized by the statute to claim fees for the inspection of vessels in the Mississippi river, and that only one of said vessels was inspected in the Mississippi river, and for that defendants had deposited the money in court. *By the Court:* There is not drawn in question the constitutionality or legality of any tax, toll or impost whatsoever, or of any fine, forfeiture or penalty imposed by a municipal corporation, and the amount in controversy is under $300. The case is, therefore, not within the provisions of Art. 62 of the Constitution of 1852, which confers on this court its jurisdiction. Conceding that the fee imposed by the Act of the Legislature is a tax, toll or impost, upon which no opinion is expressed, the only question this court can consider is the constitutionality of the laws or ordinances under which the tax, fine, toll or impost is levied, and not its application to the facts or the construction of such law by the inferior court.
Board of Health v. *Pooley, Nicol & Co*, 743.

19. The "fee" exacted of vessels undergoing inspection in time of quarantine, under the Act of 1855, is a tax. The question in this case is purely one of law, touching the legality of a tax, toll or impost, and as such this court is compelled to take jurisdiction of it, and to construe this law for the parties. SPOFFORD, J., dissenting. *Ibid.*

20. The tax, toll or impost levied upon the defendants' vessels was a legal exaction. SPOFFORD, J., dissenting. *Ibid.*

TAXES AND TAX COLLECTORS (*Continued.*)

21. The "fees" claimed by plaintiff are sanctioned by law, and the law imposing them is constitutional. LEA, J., dissenting. *Ibid.*

See BANKS AND BANKING—*New Orleans* v. *Southern Bank*, 41.
See CONSTITUTIONAL LAW—*Yeatman* v. *Crandall*, 220.
N. O. Draining Co. praying, &c, 388.

TUTORS AND TUTORSHIP.

1. A relation, who, if present in and a resident of the State, would have been entitled to the tutorship of a minor, cannot be permitted, after coming to the State, to displace the tutor regularly appointed.
Succession of Bronson, 24.

2. Where a sale of slaves is made to a minor, without the intervention of the tutrix, or a family meeting, the tutrix may sue for the price paid, upon a mere tender of the slaves at any time, whether they were subject to redhibitory vices or not. *McCall* v. *Henderson*, 209.

3. Tutors have by law the administration of the estates of their pupils, but their powers of administration do not embrace an authority to contract debts. Any one who deals with a tutor, at least any one who lends or advances money to a tutor for account of his ward or pays drafts, exceeding the funds in his hands to their credit, unless said tutor acts within the limits of a previous legal sanction, does so at his peril. The minors being under an absolute disability, it is incumbent on the party who seeks to recover from them, to show, that their indebtedness was contracted in accordance with the specified legal proceedings, or that the consideration of the indebtedness inured to their advantage, to the extent claimed.
Miltenberger v. *Elam, tutor, et als.*, 667.

See MINORS.
See PRINCIPAL AND AGENT—*Beatty* v. *McLeod*, 76.
See SALE—*Foulks* v. *Howes*, 448.

USAGE.

1. A usage regulating the enforcement of an obligation which violates the principle on which the obligation itself is based, and without which it would not exist at all, cannot be maintained.
Meeker v. *Klemm*, 104.

USUFRUCT.

1. Usufructs are not exempt from seizure, except in the single case of the usufruct, given during the marriage to the father and mother, of the estate of a minor child. C. C. 239. In all other cases it is subject to seizure and sale. C. C. 525, 547. *Davis* v. *Carroll et al.*, 705.

2. The seizure of all the right, title and interest of the debtor in and to the thing seized, is a sufficient seizure of the thing itself. *Ibid.*

3. If the donor reserves to himself the usufruct of the property donated, the donation is considered void, and if the vendor retain the possession of the thing sold, the sale is presumed to be simulated. With these presumptions in his favor, the judgment creditor of the donor may seize the property donated, without having obtained a judgment annulling the donation. C. C. 1520, 2456, 1915. C. P. 649, 654, 655. *Ibid.*

See COMMUNITY—*Succession of Viaud*, 297.

USURY.

1. A stipulation in the Act of Mortgage that the mortgagor, in the event the debt has to be made by suit, shall pay five per cent. to the attorney, is not usurious; and the circumstance that the holders of the note are attorneys at law is no bar to the recovery of the five per cent.

Race & Foster v. *Bruen*, 34.

2. Contract decreed to be usurious because borrower paid rent in addition to interest. *Hill* v. *Maddox*, 511.

3. It is not necessary to add to the plea of usury that the obligation sought to be avoided was given in error. The policy of the law was intended to extend relief in cases where there was no error.

Waters v. *Briscoe*, 639.

WARRANTY AND CALL IN WARRANTY.

1. A party who enjoins an execution, on the ground of ownership in himself of the property seized, and who, pending the injunction suit, makes a notarial conveyance of the same property to a third person, cannot be allowed to call such third person in warranty.

Whitehead v. *Tulane*, 302.

2. The exhibition of a certificate of mortgages, or the attaching of the same to an act of sale, does not relieve vendor from an express warranty of "all mortgages and incumbrances." *Bach* v. *Lakin*, 489.

3. Where the vendee calls his vendor in warranty, and there is a decree against the plaintiff in the action for improvements put upon the land, the distribution of the amount awarded must be made between the vendee and the warrantor, according to the estimated value of the improvements made by each. *Lejeune* v. *Barrow*, 501.

WILLS AND TESTAMENTS.

1. The will of the testator not having been dictated to the notary in the presence of three attesting witnesses, is null and void.

Mathis v. *Gerantz*, 3.

2. A nuncupative will by public act declared explicitly that the three attesting witnesses were present when the will was dictated to the Recorder. The three witnesses, seven months after the execution of the will, testified that they were present at the time of the execution, but did not recollect hearing the testatrix dictate the dispositions, but believed they heard her, because they attested the will at the time. *By the Court:* This evidence is insufficient to rebut the presumption which exists in favor of the truth of an authentic act executed by a Parish Recorder in solemn form. *Succession of Young*, 65.

3. Nuncupative will by public act annulled because there was nothing in the context to show that the witnesses were present when the will was received by the notary. *Christine* v. *Verbois*, 108.

4. The rules for the opening and proof of testaments, commencing at Article 1639 of the Code, do not pronounce the penalty a nullity for their non-observance, and they nowhere say that other cases may not arise in which the strict letter of these rules may be inapplicable, and that the Judge

WILLS AND TESTAMENTS (*Continued.*)

may not receive in extraordinary cases other equally satisfactory proof that the requirements of the law have been fulfilled.
Succession of Clarke, 124.

5. The formalities required by law for the execution of wills are essential to their validity. But whenever these forms have been observed, there is then a valid will entirely independent of its probate, or any subsequent proceedings which may be commenced on the same. *Ibid.*

6. If a will is really valid, the irregular proof on which it may have been admitted to probate will not be permitted to affect the rights of parties under it. So the olographic will of *Daniel Clark* of 1811, which was admitted to probate without proof that the witnesses recognized the handwriting of *Daniel Clark* from having frequently seen him write and sign his name, as required by the old and new Code, if it had afterwards been attacked for want of this proof, would nevertheless, doubtless have been sustained on satisfactory evidence that it was entirely written, dated and signed by the testator. *Ibid.*

7. The loss or destruction of the will of *Daniel Clark* of 1813, and the long period of time which has elapsed since his death, justify a resort to secondary evidence, which would not have been necessary if the will had not been lost or destroyed, and if so long a period had not elapsed before an attempt had been made to admit it to probate. *Ibid.*

8. Article 1648 of the Code contemplates that the olographic will should be presented before the Judge before whom it is to be proven; yet it cannot be seriously contended that the loss or destruction of the will could prevent the legatee from establishing the will by secondary evidence. *Ibid.*

9. The rules established by the Code for the proof of olographic wills are imperative and prohibitory, and the court is without authority to admit to probate an olographic will not proved in the manner required by the Code. LEA, J., dissenting. *Ibid.*

10. Where a testator left $100,000 to the Mayor of the city, to be used in the construction of an orphan asylum in the city of New Orleans, and after his death his estate was so reduced as only to pay one-fourth of this amount—an amount insufficient to fulfil his intention—an investment of the sum at interest by the Mayor, with a view to raise the requisite amount, did not forfeit the legacy. *Girod* v. *Crossman*, 497.

11. For former decisions as to the construction of the same will, see 12 Rob. 549; 5 An. 441; 7 A. 692. In this case the court determined to abide by everything decided in the above recited cases, as having settled the law for the parties to this suit. *Heirs of Henderson* v. *Rost*, 541.

12. At the death of the testator the slaves, which he directed by his will to be emancipated, acquired instanter the condition of *statu liberi*, and every child of a woman who had been his slave followed the condition of his mother, and became free when she became free. Such child would be free at the time fixed for the emancipation of its mother, even had she died before that time. C. C. Art. 196. *Ibid.*

WILLS AND TESTAMENTS (*Continued.*)

13. Under the terms of the testator's will, and the above recited decisions of the Supreme Court, these *statu liberi* would become free at the expiration of the time designated by the testator without any formal manumission, but upon the express condition that, upon their refusal to go to Liberia at the time fixed for their emancipation, or upon their return after having gone thither, they should forfeit to the heirs of the testator the disposition of his will, and become slaves again. *Ibid.*

14. A nuncupative will, under private signature, may be written by the testator himself, or by another, but when written by another person, it must be "from his (testator's) dictation," or he must have "caused it to be written," in substance and form, as he presents it, declaring it to contain his last will, *ses dernieres volontés.* C. C. 1574.

Heirs of De Bardelabon v. *Averret et als.*, 636.

15. The testament falls by the birth of legitimate children of the testator posterior to its date." C. C., Art. 1698.

Succession of Parham, 646.

16. The terms "*caused it to be written,*" in Art. 1574 C. C., mean that the testator must have himself dictated the provisions of a will reduced to writing by another. *Heirs of Bordelon* v. *Heirs of Baron*, 676.

17. A nuncupative will, written by one who does not understand the language in which the will is dictated, but who receives his instructions from the testator, through an interpreter, is invalid. *Ibid.*

18. A nuncupative will, under private signature, which has been read to the testator in a language which he could not comprehend without the aid of an interpreter, is invalid. *Ibid.*

19. It is necessary to the validity of such a will that the witnesses should understand the language in which it is written and read. *Ibid.*

See SUBSTITUTIONS—*McCulop* v. *Stewart*, 106.

WITNESS.

1. Artiticle 351 of the Code of Practice was intended to compel the answer of the party in the presence of the court and opposite party, and to compel him to answer from his recollection and knowledge of the facts in his own words, and in such language as occurs to him when thus interrogated. He cannot be permitted to prepare his answers beforehand and read them in the court. *Peters* v. *Gibson*, 97.

2. A party interrogated may refer to memoranda to assist his recollection, as other witnesses may. *Ibid.*

3. Where a person who was a witness on a former trial, was present at the second trial, it is not competent to show, by a bill of exceptions taken at the previous trial, that he had then refused to answer certain questions, without, at least, first propounding the questions to him.

Trimmel v. *Marvel*, 404.

4. Witnesses cannot be impeached by proof of particular facts, but only by proof of their general reputation for truth and veracity in the neigh-

WITNESS (*Continued.*)

borhood where they are known, otherwise a witness might be prejudiced without the possibility of defending himself. *Crane* v. *Allen*, 498.

5. A person who is a mere nominal party to the suit, is a competent witness. *Bryan* v. *Day*, 601.

6. Wherever a nominal party to a suit is liable for costs in his individual capacity, he is incompetent as a witness, although he may demand nothing for himself, but joins the plaintiff in a prayer for a Judgment in his (plaintiff's) favor. MERRICK, C. J. C. C. 2260. *Ibid.*

7. A defendant in execution is not a competent witness to prove ownership in a third person, of property seized as his own upon the trial of an issue of fraud or simulation in his transfer of such property. *Phœbe* v. *Vienne*, 688.

See PRACTICE—*Haughton* v. *Her Husband*, 200.